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THE UNITED STATES' CLAIMS OF CUSTOMARY LEGAL RIGHTS UNDER THE LAW OF THE SEA CONVENTION

On December 10, 1982, the United Nations Convention on the Law of the Sea (Convention or LOS Convention)¹ opened for signature. The Convention creates a comprehensive legal framework concerning all the political and legal issues that result from the interaction between society and the world's marine environment.² The Convention is the product of the Third United Nations Conference on the Law of the Sea (UNCLOS III)³ convened by the United Nations to remedy the defects in the existing law of the sea.⁴

1. Convention on the Law of the Sea, *opened for signature* December 10, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 INT'L LEGAL MATERIALS 1261 (1982) [hereinafter cited as Convention or LOS Convention]. The 1958 Geneva Conventions on the Law of the Sea essentially codified the customary law of the sea that existed at that time. See Maduro, *Passage Through International Straits: The Prospects Emerging From the Third United Nations Conference on the Law of the Sea*, 12 J. MAR. L. & COM. 65, 65 (1980). Since 1958, however, many nations have made substantial new claims to various parts of the ocean including larger territorial seas, continental shelves, and fishing zones. *Id.* Moreover, improved technology provided some nations with the capability to mine the deep seabed and fish in distant waters. *Id.* The new claims to the sea and the advanced technology created increasing pressure for new guidelines to govern use of the sea. *Id.* As a result, General Assembly Resolution 2750C called for a conference on the law of the sea to draft a comprehensive treaty dealing with all aspects of marine law. *Id.* The first meeting of the Third United Nations Conference on the Law of the Sea (UNCLOS III) opened in December, 1973 in New York. *Id.* Nine years transpired before UNCLOS III reached a consensus on a draft Convention on the Law of the Sea (Convention or LOS Convention). See Zuleta, *The Law of the Sea after Montego Bay*, 20 SAN DIEGO L. REV. 475, 477 (1983). UNCLOS III operated on the premise that all matters pertaining to the oceans are interrelated, thus most nations perceive the treaty to be a "package deal," that is, a nation must agree to the entire treaty because the Convention is an assemblage of rights and obligations. *Id.* at 477-479.

2. See Pardo, *The Convention on the Law of the Sea*, 20 SAN DIEGO L. REV. 489, 489-490 (1983). The Convention is a completely integrated legal system regulating the world's activity in the seas. *Id.* at 490. The Convention makes major innovative changes in numerous areas of the law of the sea. *Id.* The innovations include a change in the concept of innocent passage, introduction of the concept of a transit passage right through international straits, introduction of the concept of archipelagic waters, the creation of a right to an exclusive economic zone (EEZ), and the establishment of an international regime governing the deep seabed that will exploit the seabed for the benefit of all nations. *Id.* at 490-491. Additional changes made by the LOS Convention include a change in the definition of the continental shelf and a recognition that scientific research and the construction of artificial islands is a freedom of the high seas. *Id.* at 490.

3. See Pardo, *supra* note 2, at 489. UNCLOS III concluded its work on April 30, 1982, when the conference adopted the text of the Convention after nine years and eleven negotiating sessions. *Id.*; see Zuleta, *supra* note 1, at 477.

4. See Maduro, *supra* note 1, at 65. General Assembly Resolution 2750C convened UNCLOS III to create new guidelines to regulate the marine environment. *Id.* The pre-existing law of the sea, based on the 1958 Conventions on the Law of the Sea, was inadequate to deal with numerous state claims to fishing, mining, environmental protection, and research rights. *Id.* To facilitate resolution of the numerous conflicts and claims, UNCLOS III formed three committees. *Id.* at 66. The first committee addressed the issues pertaining to an international regime for the deep seabed. *Id.* The second committee addressed the traditional areas of the law of the sea including

The basis of the law of the sea prior to the LOS Convention arises from the 1958 Geneva Conventions.⁵ The Geneva Convention on the Territorial Sea and Contiguous Zone reiterated the basic principle that the coastal state has absolute sovereignty over an adjacent belt of ocean called the territorial sea⁶ and limited jurisdiction over the area of ocean just beyond the territorial sea called the contiguous zone.⁷ The coastal state must give all states' ships the right of innocent passage through territorial seas and international straits.⁸ The Convention on the High Seas defines the high seas and declares that all states have the express freedom to navigate, to fish, to lay submarine cables and pipelines, and to fly over the ocean.⁹ The Geneva Convention on the Con-

the territorial seas, economic zones, continental shelves, high seas, straits passage, archipelagoes, and fishing. *Id.* The third committee dealt with marine pollution, conservation, scientific research, and technology transfer. *Id.*

5. Convention on the Territorial Sea and Contiguous Zone, *done* 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention]; Convention on the High Seas, *done* 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as High Seas Convention]; Convention on the Continental Shelf, *done* 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as Continental Shelf Convention]; Convention on the Conservation of Living Resources, *done* 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; *see also* T. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 183 n.3 (2d ed. 1973) (Geneva Conventions evidence current customary law).

6. Territorial Sea Convention, *supra* note 5, art. 1.

7. Territorial Sea Convention, *supra* note 5, art. 24. In the contiguous zone, the coastal state has the power to punish infringement of customs, fiscal, immigration, or sanitary regulations. *Id.* The coastal state, however, does not have complete sovereignty in the contiguous zone because in the zone other nations have the right to exercise the freedoms of the high seas. *See* T. BROWNLIE, *supra* note 5, at 210.

The concept of an EEZ embodied in the LOS Convention substantially supercedes the concept of a contiguous zone. B. DUBNER, THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOES AND ARCHIPELAGIC STATES, 14 (1976).

8. *See* Territorial Sea Convention, *supra* note 5, art. 14 (guarantees right of innocent passage in territorial sea); art. 16(4) (guarantees right of innocent passage through international straits). The right of innocent passage is non-suspendable in international straits. *Id.* art. 16(4). Historically, however, a problem arose with the concept of innocent passage because no definite rule exists to define what passage is innocent and, therefore, the coastal state subjectively determined whether or not a particular passage was innocent. Richardson, *Law of the Sea: Navigation and Other Traditional National Security Considerations*, 19 SAN DIEGO L. REV. 553, 560 (1982) [hereinafter cited as *Law of Sea*]. Article 14(4) of the Convention on the Territorial Sea and Contiguous Zone declares that passage is innocent so long as the passage is not prejudicial to the peace, good order, or security of the coastal state. Territorial Sea Convention, *supra* note 5. The standard proclaimed in article 14(4) is so nebulous that a coastal state may determine passage is not innocent because of the ship's cargo, nationality, destination, or method of propulsion. *Law of Sea, supra*, at 560. Thus, a ship will never be absolutely certain whether its passage is innocent. *See* T. BROWNLIE, *supra* note 5, at 204 (innocent passage difficult to determine because term is imprecise); B. DUBNER, *supra* note 7, at 12 (concept of innocent passage vague because does not apply equally to all situations).

9. *See* High Seas Convention, *supra* note 5, art. 1 (high seas are all seas not in internal or territorial waters of another nation); art. 2 (navigation, fishing, laying submarine cables and pipelines, and right to fly over oceans are freedoms of high seas). Hugo Grotius originally conceived the concept of freedom of the high seas. B. DUBNER, *supra* note 7, at 16. Grotius' purpose in formulating the rule was to keep open trade routes for the Dutch. *Id.* He argued that because the seas are so vast, no state can control them, and therefore all states should have free access

tinental Shelf governs, in part, exploitation of seabed resources¹⁰ and gives a coastal state the right to exploit resources in or on the seabed or subsoil of that state's continental shelf.¹¹ The 1958 Geneva Conventions have no provisions that deal explicitly with the deep seabed outside the margins of the continental shelf.¹²

The new LOS Convention significantly alters the framework established by the 1958 Conventions.¹³ The Convention is a product of conflicting interests, and therefore some provisions protect the interests of developing nations and other provisions protect the already developed nations.¹⁴ The Convention articles on the exclusive economic zone (EEZ), for example, help safeguard the developing countries' claim to an equitable share of the world's resources.¹⁵

to the ocean and its resources. *Id.*

The four freedoms expressly articulated in article 2 of the Convention on the High Seas are not the definitive list of high seas freedoms. Article 2 also provides that the exercise of other freedoms recognized by international law shall be legal. High Seas Convention, *supra* note 5, art. 2; *see also* B. DUBNER, *supra*, at 16 (art. 2 does not restrict high seas freedoms to those expressly granted in Convention).

10. *See* Continental Shelf Convention, *supra* note 5, art. 1 (continental shelf defined as seabed and subsoil adjacent to coast but outside territorial sea to depth of 200 meters or beyond where depth still allows exploitation); art. 2 (coastal state has right to exploit natural resources in or on continental shelf); *see also* T. BROWNLIE, *supra* note 5, at 224 (major objective of Continental Shelf Convention is to provide stable basis for seabed operations).

11. Continental Shelf Convention, *supra* note 5, art. 2. The coastal state can exploit the seabed up to the depth of 200 meters, or if the continental shelf goes beyond 200 meters, the coastal state can exploit out to the depth where the shelf still admits of exploitation. B. DUBNER, *supra* note 7, at 14-15.

12. *See* T. BROWNLIE, *supra* note 5, at 231. The United Nations' call for a Conference in 1973 to establish a deep seabed regime implies that no regime existed before UNCLOS III. *See id.*

13. *See supra* note 2 (purpose and scope of Convention and area of law changed by Convention).

14. *See* Richardson, *The United States Posture Toward the Law of The Sea Convention: Awkward but not Irreparable*, 20 SAN DIEGO L. REV. 505, 511 (1983) (Convention is "package deal," thus Third World satisfies United States' navigational concerns in return for concessions on Third World resource interest); Zuleta, *supra* note 1, at 478-479 (signatories' opening statements that Convention is compromise document and thus package deal); 20 SAN DIEGO L. REV. 679, 680 (1983) (Convention represents compromise).

15. *See* R.P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA, 199 (1982) (EEZ is concept which creates equitable framework to exploit ocean resources). An example of inequitable resource allocation that the EEZ supposedly alleviates involves the fishing industry in which 90% of the commercial fish catch comes within the EEZ. *See* Alexander, *The Ocean Enclosure Movement: Inventory & Prospect*, 20 SAN DIEGO L. REV. 561, 580 (1983). The developed nations, with less than 33% of the world's population, took 60% of the commercial fish harvest in 1970. *See* R.P. ANAND, *supra*, at 199. The Kenyan representative, speaking to the Seabed Committee of UNCLOS III, declared that a legal system which allows the developed countries to take a disproportionately large share of the fish harvest is inequitable. *Id.* Speaking for the Third World, the Kenyan representative further declared that a change in such an inequitable system was necessary. *Id.* The development of an EEZ, however, might not help developing countries share equitably in world resources because many of these countries have little or no coastline and thus lack a sizeable EEZ. *See* Alexander, *supra*, at 576. In contrast, some already developed nations possess broad coastal margins that are rich in living and mineral resources. *Id.* at 576-577. These broad margin countries include the United States, New Zealand, Indonesia, the Soviet Union, Japan, Iceland, Norway, and Argentina. *Id.*

The relatively new concept of an EEZ substantially supercedes the concept of a contiguous zone declared in the Convention on the Territorial Sea and Contiguous Zone.¹⁶ Article 56 of the LOS Convention provides that in the EEZ the coastal state has an exclusive right to manage, conserve, and exploit the living and nonliving resources which include resources in the seabed, subsoil, and water superjacent to the seabed.¹⁷ Moreover, the coastal state has the exclusive right to exploit any energy sources in the EEZ and to regulate any marine research in the EEZ.¹⁸ Article 59 delimits the outward extent of the EEZ as two hundred nautical miles from the territorial sea baselines.¹⁹ Article 58 declares that in the EEZ all states will have the traditional high seas freedoms of navigation and overflight as well as the right to lay submarine cables and pipelines. Article 58 also provides the right to use the EEZ for any other legal purpose under international law.²⁰

In contrast, the Convention's provisions concerning right of transit passage through international straits protect the needs of developed countries to provide mobility for military forces and commercial fleets.²¹ The provisions on a right of transit passage supercede the concept of innocent passage enunciated in the Convention on the Territorial Sea and Contiguous Zone.²² Article 37 declares that the scope of the transit passage right applies to straits used in international navigation for vessels coming from the high seas or an

16. See B. DUBNER, *supra* note 7, at 14 (EEZ is new law which supercedes concept of contiguous zone).

17. Convention, *supra* note 1, art. 56.

18. *Id.*

19. *Id.* art. 59.

20. *Id.* art. 58.

21. See R.P. ANAND, *supra* note 15, at 206 (maritime powers wanted to maintain freedom of navigation); Richardson, *supra* note 14, at 505 (Convention benefits United States' interests of mobility for military and commercial fleets). The developed countries, like the United States, did not want the right of transit through international straits based solely on the right of innocent passage. See Territorial Sea Convention, *supra* note 5, art. 16(4). Because the concept of innocent passage is subjective, the maritime powers wanted a more objective test that would guarantee the right of transit. R.P. ANAND, *supra*, at 206. See generally *supra* note 8 (concept of innocent passage is vague and subjective). The United States and other maritime powers also proclaimed a need for a transit passage right because claims of a 12-mile territorial sea closed 116 straits that previously had a high seas corridor. P.R. ANAND, *supra* at 206. Thus, the United States conditioned acceptance of a 12-mile territorial seas at UNCLOS III on a guaranteed right of transit passage. *Id.* at 207.

22. See Maduro, *supra* note 1, at 70 (Convention regime is *sui generis*); Oxman, *The New Law of the Sea*, 69 A.B.A.J. 156, 158 (1983) (Convention's right of transit passage more liberal than right of innocent passage). See *supra* text accompanying note 8 (prior to LOS Convention passage through straits based on innocent passage).

The concept of innocent passage still exists in the new Convention. See Convention, *supra* note 1, art. 17 (innocent passage applies to passage through territorial sea). Innocent passage, however, is less subjective under the LOS Convention because the Convention gives a specific, objective list of actions prejudicial to the peace, good order, and security of the coastal state which makes passage not innocent. *Id.* art. 19(2); see also Maduro, *supra* note 1, at 77 (problem of subjectivity reduced because article 19 describes non-innocent actions).

EEZ into other waters classified as an EEZ or high seas.²³ Article 38 not only grants an unimpeded right of navigation through international straits but also specifically declares the freedom of overflight, a right not provided in the Convention on the Territorial Sea and Contiguous Zone.²⁴ Some experts believe that article 38 and article 39 together establish that submarines have the freedom to traverse an international strait while submerged,²⁵ another right not provided in the 1958 Convention on the Territorial Sea and Contiguous Zone.²⁶

The final relevant provisions of the LOS Convention pertain to mining the deep seabed. Article 136 declares that the seabed and ocean floor (Area)²⁷ is the "common heritage" of mankind.²⁸ When ratification of the Convention is complete, the International Seabed Authority (Authority) will govern

23. Convention, *supra* note 1, art. 37. The criterion used to determine whether a waterway has achieved status as an international strait is the same as that used before the Convention. Maduro, *supra* note 1, at 71. A strait is international if "used for international navigation." *Id.*

24. Convention, *supra* note 1, art. 38; *see also Law of Sea, supra* note 8, at 560 (right of innocent passage does not include right of overflight or submerged navigation). The new Convention also moots the question of whether innocent passage allows the passage of warships. Oxman, *supra* note 22, at 158. *See generally* T. BROWNLEE, *supra* note 5, at 204 (international law commentators divided on issue of innocent passage for warships under Territorial Sea Convention). Article 38 grants the right of transit passage for warships through international straits. *See* Convention, *supra* note 1, art. 38 (all ships enjoy right of transit passage).

25. *Law of Sea, supra* note 8, at 560. Article 38(2) defines transit passage as an exercise of "freedom of navigation," a term of art commonly recognized as giving submarines the right to navigate underwater. *Id.* at 564; *see* Convention, *supra* note 1, art. 38. Moreover, article 39 provides that crafts shall proceed in their "normal mode", another term of art recognizing submarines' right to proceed while submerged. *Law of Sea, supra* note 8, at 564; *see* Convention, *supra* note 1, art. 39.

26. *See Law of Sea, supra* note 8, at 560 (Territorial Sea Convention did not allow overflight or submerged navigation as right of innocent passage).

27. *See* Convention, *supra* note 1, art. 1(1). Article 1 defines the Area as the seabed and ocean floor and subsoil thereof beyond limits of national jurisdiction. *See id.*

28. *See id.* art. 136 (Area and its resources are common heritage of mankind). Ambassador Arvid Pardo of Malta first articulated the concept of the seabed as man's common heritage in 1967. Zuleta, *supra* note 1, at 482. The idea of common heritage represents to developing nations the notion of mutual exploitation of the seabed. R.P. ANAND, *supra* note 15, at 203. The United Nations has taken two important steps prior to the convention that embody the common heritage principle. First, a Moratorium Resolution passed by the General Assembly in 1969 declared that all states shall refrain from any activity designed to exploit the seabed. G.A. Res. 2574, 24 U.N. GAOR, U.N. Doc. A/7630 (1969). Further, the Moratorium declared that no claim to the seabed will receive recognition until the creation of a regime to govern the seabed. *Id.* In 1970, the General Assembly passed a resolution which provided that the seabed was the common heritage of mankind and, therefore, beyond the jurisdiction of any nation. Declaration of Principles Governing the Seabed & Ocean Floor, G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) at 24, U.N. Doc A/3028 (1971) [hereinafter cited as Declaration of Principles]. The Declaration of Principles received overwhelming support, including the support of the United States. Arrow, *The Customary Norm Process and the Deep Seabed*, 9 OCEAN DEV. & INT'L L. 1, 36 (1981).

The LOS Convention makes the common heritage principle operative by ensuring that developing countries will receive benefits from seabed mining. *See* Convention, *supra* note 1, art. 137 (rights in resources in Area belong to all mankind); art. 140 (activities in Area must be for benefit of mankind); art. 153 (organization of activities in Area must be on behalf of mankind).

the Area.²⁹ The Authority will be responsible for establishing rules and regulations to govern mining in the deep seabed.³⁰ The Authority also will manage the Enterprise,³¹ an intergovernmental business that will mine the seabed for the benefit of the Authority and the developing nations.³²

One hundred and nineteen nations signed the LOS Convention on the day it opened for signature.³³ The signing nations represented industrialized and developing nations encompassing every political and legal system on the globe.³⁴ The signatories, however, did not include the United States.³⁵ President Reagan announced he would not authorize signature of the Convention³⁶ because the provisions relating to deep seabed mining were not in the United States' interests.³⁷ Reagan's refusal to authorize signature of the Convention

29. Convention, *supra* note 1, art. 156. The Assembly and the Council share the decision making power of the International Seabed Authority (Authority). *Id.* art. 158. The Assembly is the supreme organ of the Authority and the Council is the Authority's executive body. *See id.* art. 160 (Assembly is supreme organ); art. 162 (Council is executive body); *see also* Oxman, *supra* note 22, at 160 (even though Assembly is supreme organ, Council, by consensus, must approve all legally binding rules and restrictions).

30. *See* Oxman, *supra* note 22, at 160 (Authority approves rules, regulations, environmental orders, and amendments to seabed provisions of Convention). The Authority has the express power to approve contracts to mine the seabed but may refuse to grant a contract in only four instances. *Id.* The Authority may refuse to grant a contract if the applicant performed poorly under a previous contract, if for environmental reasons the closing of the proposed mining site becomes necessary, if the sponsoring state would acquire too many mine sites, or if a contract for the proposed area already exists. *Id.*

31. Convention, *supra* note 1, art. 170.

32. *See* Brewer, *Deep Seabed Mining: Can an Acceptable Regime Ever be Found?*, 11 OCEAN DEV. & INT'L L. 25, 45-46 (1982) (Enterprise has full authority to become vertically integrated mining company); Oxman, *supra* note 22, at 160 (Enterprise is intergovernmental mining company).

33. *See* Zuleta, *supra* note 1, at 475 n.1 (lists 119 nations which signed Convention on opening day). The large number of signatories reflects significantly on the virtual consensus of international opinion regarding ocean use and exploitation. *Id.* at 476. The number of signatories is also great enough to establish the Preparatory Commission, an organization that will promulgate the rules and regulations to govern the Authority once the Convention ratification process is complete. Richardson, *supra* note 14, at 506. Moreover, the number of signatories indicates the Convention easily should receive the necessary sixty ratifications to bring the treaty into force. *Id.*

34. *See* Zuleta, *supra* note 1, at 476 (never in history has such large and varied group of countries signed treaty).

35. *See* Oxman, *supra* note 22, at 156 (United States, Belgium, Great Britain, Italy, Luxembourg, and West Germany did not sign treaty because of deep seabed mining provisions).

36. *See* U.S. CONST. art. II, § 2, cl. 2 (president makes treaties with advice and consent of two-thirds of Senate); *see also* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (in area of foreign affairs president make treaties with advice and consent of Senate but he alone has power to speak and negotiate).

37. *See* Richardson, *supra* note 14, at 505 (Reagan Administration believed Convention provisions on deep seabed mining are not in United States' best interest). The Reagan Administration had several objections to the deep seabed provisions. *See* 20 SAN DIEGO L. REV. 679, 682-683 (1983). The President objected to production ceilings that might make seabed mining unprofitable. *Id.* Furthermore, the Administration believed that production ceilings would discriminate against seabed miners in favor of established land miners. *Id.* Reagan also disapproved of financial burdens placed on developed countries through required payments of huge sums of money to the international organs that govern and exploit the seabed. *Id.* These economic hindrances significantly decrease the chance that a consortium would attempt to mine the seabed because without a 20-year

endangers United States' policy goals since the United States cannot derive rights directly from the Convention either to guarantee the right of transit passage through international straits or to uphold the United States' claim to an EEZ.³⁸ The question arises whether the United States can rely on the Convention as customary international law to provide a right of transit passage and an EEZ without binding American mining interests to the Convention provisions that create a deep seabed regime.

In the traditional sense, custom is a generally recognized manifestation of international law or a practice considered binding by the international community.³⁹ In addition, the statute governing the International Court of Justice (I.C.J.) codifies the concept of custom into international law.⁴⁰ Arti-

guarantee of unrestricted access to the deep seabed no company would gamble with the initial outlay of \$1.5 billion. Richardson, *supra* note 14, at 508. Reagan also balked at provisions that limited access to the seabed on the basis of a company's nationality. 20 SAN DIEGO L. REV. 679, 683. Thus an anti-monopoly clause, which essentially guarantees that each nation's share of the seabed will be equal, will limit the United States' allocated share of the seabed. *Id.* The Administration did not like the anti-monopoly provision because the Soviet Union is self-sufficient in minerals found in the seabed and the United States is not. *Id.* Reagan feared American security interests might be hurt not only by the anti-monopoly clause but also by the Convention provisions that require mining companies to make the technology necessary to mine the deep seabed available to the Enterprise. *Id.* at 695 n.115.

The Reagan Administration has taken the position that mining the deep seabed is a high seas freedom analogous to the freedom to fish. *Id.* at 702. The view that collection of manganese nodules is legal, similar to the right to fish, has some scholarly support. See Arrow, *supra* note 28, at 21; Saffo, *The Common Heritage of Mankind: Has the General Assembly Created a Law to Govern Seabed Mining?*, 53 TUL. L. REV. 492, 496 (1979).

38. See Richardson, *supra* note 14, at 511 (failure to sign could endanger right to navigation and overflight); see also Zuleta, *supra* note 1, at 478 (view of most states is that one must belong to Convention to derive any rights from Convention).

39. See Arrow, *supra* note 28, at 2 (custom is general practice recognized as binding); Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L.J. 305, 309 (1981) (custom is recognized manifestation of international law).

40. See I.C.J. STAT. art. 38(1)(b) (international custom, accepted as law, applied in settling disputes). The International Court of Justice (I.C.J.) is the principle judicial organ of the United Nations. U.N. CHARTER art. 92. All members of the United Nations are automatically parties to the statute of the I.C.J. and, thus, have the right to use the I.C.J. to settle disputes. *Id.* art. 93. The I.C.J. has two basic forms of jurisdiction, contentious jurisdiction over conflicts between states and advisory jurisdiction to address legal issues posed by international organs. F. KIRGIS, *INTERNATIONAL LAW*, 15 (1982-83 ed.). The I.C.J. has contentious jurisdiction based on consent of the parties, but a state's becoming a party to the I.C.J. statute is insufficient to supply the court with jurisdiction. T. BROWNIE, *supra* note 5, at 695-696. The United States has filed a unilateral statement accepting the jurisdiction of the I.C.J. See F. KIRGIS, *supra*, at 19. The United States, however, qualified the declaration stating that I.C.J. jurisdiction will not bind the United States in disputes that are essentially domestic. Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 1979 BRIT. Y.B. INT'L L. 63, 63 (1981). Some experts believe that the United States' conditional acceptance of I.C.J. jurisdiction is illegal. T. BROWNIE, *supra* note 5, at 703 & n.3.

The I.C.J. also has advisory jurisdiction. I.C.J. STAT. art. 65(1). The advisory power gives the I.C.J. the right to give an advisory opinion on any legal question to the General Assembly, Security Council, or other authorized international organization. T. BROWNIE, *supra* note 5, at 705-706. The primary purpose of advisory opinions is to provide authoritative legal guidelines to international organizations. *Id.*

cle 38(1)(B) provides that the I.C.J. shall settle disputes by applying international custom as evidence of general practice accepted as law.⁴¹ In evaluating whether certain practices are applicable as customary law, commentators bifurcate the concept of custom into the categories of state practice and *opinio juris*, both elements of which are necessary to the creation of customary international law.⁴²

Though commentators hold conflicting views of what constitutes state practice, experts generally recognize several elements that embody the concept of state practice.⁴³ The concept of state practice consists initially of some form of state action or restraint from action.⁴⁴ Additionally, the states' actions must be nearly uniform and consistent, encompass a sufficiently large number of nations⁴⁵ and exist for some duration of time.⁴⁶ Finally, a practice must have the adherence of the specially affected states to become custom.⁴⁷

The initial step in an analysis of custom through state practice involves determining whether any relevant state practice exists.⁴⁸ In the case of the LOS Convention, the numerous nations already exercising the right to claim an EEZ amply fulfill the requirement of state action.⁴⁹ Additionally, many nations have either claimed or disclaimed that a right of transit passage or a right to mine the deep seabed exists outside the Convention.⁵⁰

41. I.C.J. STAT. art. 38.

42. See T. BROWNLIE, *supra* note 5, at 607 (basic requirements of custom); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, 49 (1971) (some type of state practice and *opinio juris* must exist to create custom).

43. See Akehurst, *Custom as a Source of International Law*, 1974-75 BRIT. Y.B. INT'L L. 12, 21 (1974-75) (state practice involves quantity and consistency); T. BROWNLIE, *supra* note 5, at 6-7 (state practice consists of duration, uniformity, and generality of practice); A. D'AMATO, *supra* note 42, at 88 (state practice consists of act or acts of nations).

44. See Akehurst, *supra* note 43, at 1-11 (state practice includes actions and claims by nations); Arrow, *supra* note 28, at 3 (restraint of state from pursuing certain behavior demonstrates state practice); A. D'AMATO, *supra* note 42, at 88 (state practice includes only state actions). The I.C.J. holds that claims by nations can constitute state practice. Akehurst, *supra*, at 5.

45. See Akehurst, *supra* note 43, at 12, 16-17 (repetition of state action coupled with sufficient number of states participating in action creates custom); Arrow, *supra* note 28, at 3 (sufficient number of states must participate in practice); T. BROWNLIE, *supra* note 5, at 6-7 (substantial uniformity of practice coupled with sufficient number of states needed to show custom).

46. See Akehurst, *supra* note 43, at 15 (requirement of time varies depending on need for repetition of practice); Arrow, *supra* note 28, at 3 (final element of custom is time); T. BROWNLIE, *supra* note 5, at 6 (no specific requirement for duration of time necessary if state practice is consistent and universal).

47. See Arrow, *supra* note 28, at 3 (substantial majority of specially affected nations must adhere to practice).

48. See *supra* text accompanying note 42 (state practice is basic element of customary international law).

49. See Alexander, *supra* note 15, at 570 (since 1974, 56 countries have claimed an EEZ); R.P. ANAND, *supra* note 15, at 218 (EEZ accepted as fact before Convention); Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 321, 332 (1981) (EEZ was customary law even before Convention signed).

50. See Zuleta, *supra* note 1, at 478 (United States claims transit passage right is custom but most nations believe rights conferred only on signatories); Comment, *The International Seabed Authority Decision Making Process: Does it Give a Proportionate Voice to the Participants*

The next step in the analysis is to determine whether participation in the relevant state practice is extensive and uniform.⁵¹ While states' practices need not be absolutely uniform, custom requires substantial uniformity of action by a sufficiently large number of nations.⁵² In the *North Sea Continental Shelf Cases (North Sea Cases)*,⁵³ the I.C.J. held that in the 1958 Convention on the Continental Shelf the equidistance principle⁵⁴ did not represent custom, partly because an insufficient number of nations ratified or acceded⁵⁵ to the Convention.⁵⁶

Another element of the analysis involves an inquiry into the sufficiency of the passage of time.⁵⁷ Commentators recognize that the elevation of state practice to the status of customary law requires the passage of some time.⁵⁸ Yet, the question of time remains a flexible standard in that no specific requirement of time is set, especially when consistent state practice is easily demonstrable.⁵⁹ In the *North Sea Cases*, the I.C.J. held that a short time span does not necessarily bar formation of custom as long as the practice receives acceptance on a widespread and representative basis.⁶⁰ The element of time is less important today because the actions of all nations are known immediately worldwide.⁶¹ The communication revolution makes the number of states participating in a practice more important than the amount of time over which that practice has occurred since states' actions and reactions are readily

Interests in Deep Sea Mining?, 20 SAN DIEGO L. REV. 659, 663 (1983) (developing nations view seabed exploitation outside Convention as illegal, while United States believes common heritage principle is non-binding).

51. See *North Sea Continental Shelf Cases (W. Ger. v. Den. & Neth.)* 1969 I.C.J. 4, 43 (widespread and representative participation might suffice to show custom); T. BROWNIE, *supra* note 5, at 6-7 (substantial uniformity of practice coupled with substantial number of states needed to show custom).

52. See *North Sea Cases*, 1969 I.C.J. at 43 (substantial uniformity by sufficiently large number of states necessary to show custom).

53. *North Sea Continental Shelf Cases (W. Ger. v. Den. & Neth.)* 1969 I.C.J. 4. See generally *infra* text accompanying notes 100-131 (discussing facts and holding of *North Sea Cases*).

54. See *Continental Shelf Convention*, *supra* note 5, art. 6(2). The equidistance principle holds that if adjacent states cannot agree on a delimitation of the continental shelf, then the delimitation process will proceed by drawing a boundary line so that each point on the line is equidistant from the adjacent states' baselines. *Id.* Germany did not want to use the equidistance principle because the German coast is concave, thus the use of the equidistance principle by the states adjacent to Germany limits Germany's continental shelf. See *North Sea Cases*, 1969 I.C.J. at 18; see also *id.* at 17 (diagram showing effect of equidistance principle on concave coast).

55. See T. BROWNIE, *supra* note 5, at 586 (accession occurs when state which did not sign treaty formally accepts provisions of treaty).

56. See *North Sea Cases*, 1969 I.C.J. at 25, 42. Forty-nine nations signed and thirty-nine ratified or acceded to the treaty. *Id.* The I.C.J. held that the number of ratifications and accessions was insufficient to show custom. *Id.*

57. See *supra* text accompanying note 46 (passage of time is one element necessary to create custom).

58. *Id.*

59. See *Arrow*, *supra* note 28, at 3 (time element is flexible); T. BROWNIE, *supra* note 5, at 6 (if consistent and uniform practice exists, no particular duration required).

60. *North Sea Cases*, 1969 I.C.J. at 43.

61. Akehurst, *supra* note 43, at 16.

ascertainable.⁶² Several commentators contend that in special circumstances a single incident can establish customary law.⁶³

The final element needed to show consistent state practice is the adherence to the custom by states specially affected by the practice.⁶⁴ State practice cannot constitute customary international law unless the states most affected by the practice comply with the practice as custom.⁶⁵ For example, customary law on the law of the high seas could solidify only with the concurrence of the maritime powers.⁶⁶ The view that specially affected nations' concurrence is necessary to create custom has received the support of the I.C.J.⁶⁷ and international law commentators.⁶⁸

A demonstration of consistent state practice alone will not establish customary international law because the existence of *opinio juris* is also necessary to create custom.⁶⁹ *Opinio juris* means that nations believe a practice is binding.⁷⁰ State action or inaction results, therefore, from a nation's perceived obligation to act in a certain manner,⁷¹ and not from notions of comity or inability to act or on the basis of mere habit.⁷² In the *North Sea*

62. See *id.* (number of states participating in custom more important than duration of practice); T. BROWNLE, *supra* note 5, at 6 (if consistent, uniform state practice exists then no particular duration required).

63. See 1950 Y.B. INT'L LAW COMM'N 5 (1950) (two experts agree that custom can arise at once); Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 36 (1965) (no need for repeated usage if countries involved believe custom is legally binding); Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 420-421 (1961) (usage need not be of long duration). For example, the principle that nations have sovereignty over their airspace arose the instant World War I started, when planes first came into use for military purposes. Akehurst, *supra* note 43, at 15. In the *North Sea Cases*, the I.C.J. indicates that a single incident (signing a convention) might create custom if state practice is extensive and virtually uniform. 1969 I.C.J. at 42; see also A. D'AMATO, *supra* note 42, at 120 (I.C.J. went to great lengths to affirm that treaties can generate customary law).

64. See *Arrow*, *supra* note 28, at 3 (substantial majority of specially affected states must adhere to practice).

65. *Id.*

66. See Lauterpacht, *Sovereignty over Submarine Areas*, 1950 BRIT. Y.B. INT'L L. 376, 394 (1950) (conduct of maritime powers is crucial in determining law of sea).

67. See *North Sea Cases*, 1969 I.C.J. at 43 (adherence of substantial majority of specially affected nations is necessary to create custom).

68. See 1 D. O'CONNELL, *INTERNATIONAL LAW*, 18 (2d ed. 1970) (states' abstention from protesting against particular practice is significant to show custom only when states' vital interests are concerned); *Arrow*, *supra* note 28, at 3 (substantial number of specially affected states must adhere for practice to become custom); Lauterpacht, *supra* note 66, at 394 (conduct of maritime powers is crucial in determining law of sea).

69. See *supra* text accompanying note 42 (both state practice and *opinio juris* are essential components of custom).

70. *Arrow*, *supra* note 28, at 3; T. BROWNLE, *supra* note 5, at 7.

71. See *supra* text accompanying note 70 (*opinio juris* based on states' notion that practice is obligatory).

72. See *North Sea Cases*, 1969 I.C.J. at 44 (habitual nature of practice insufficient to show custom); *Arrow*, *supra* note 28, at 3 (*opinio juris* does not occur when state bases its practice on comity or inability to act); T. BROWNLE, *supra* note 5, at 8 (state practice must rest on sense of legal obligation, not motives of courtesy, fairness, or morality).

Cases, the I.C.J. held that a practice is custom only if a nation believes the practice is obligatory under a binding rule of international law.⁷³ Notwithstanding the historical requirement of *opinio juris*,⁷⁴ conflicting views exist about the exact meaning of the term. Other than the traditional view stated in the *North Sea Cases*⁷⁵ and article 38 of the I.C.J. statutes,⁷⁶ some commentators believe that the doctrine of *opinio juris* is a contradiction in terms that provides no basis for determining what emerging custom will be law.⁷⁷ Experts also question the usefulness of *opinio juris* because statesmen's motives are often obscure, and thus determining whether a state believed its actions were obligatory under customary law is impossible.⁷⁸ One commentator, therefore, has theorized that to satisfy the element of *opinio juris* some articulation of a practice as custom must appear.⁷⁹ *Opinio juris* exists in this view whenever some public statement appears that characterizes a particular principle as custom.⁸⁰ A similar view of the concept states that unless evidence to the contrary is available *opinio juris* is presumptively present.⁸¹ Finally, some experts maintain that the concept of protest and acquiescence is the basis of *opinio juris*.⁸² Under this doctrine, the protest of a sufficient number of states will prevent an emerging practice from becoming customary law.⁸³ Conversely, if an ample number of states acquiesce in allowing states' actions, the uncontested action will eventually become custom.⁸⁴

73. *North Sea Cases*, 1969 I.C.J. at 43.

74. See Arrow, *supra* note 28, at 3 n.7 (historical requirement of *opinio juris* dates back to late eighteenth century).

75. See *supra* text accompanying note 73 (*North Sea Cases* definition of *opinio juris*).

76. See I.C.J. STAT. art. 38 (I.C.J. shall apply custom as evidence of general practice accepted as law).

77. See Akehurst, *supra* note 43, at 32; A. D'AMATO, *supra* note 42, at 51-52. The traditional view of *opinio juris* has some analytical difficulties because *opinio juris* seems to require a state to believe a principle is already customary law before the principle becomes law. Akehurst, *supra* note 43, at 32. The feature of *opinio juris* which requires state belief that a practice is customary law before the practice actually becomes custom makes the doctrine of *opinio juris* a contradiction in terms. A. D'AMATO, *supra* note 42, at 51. Thus, the element of *opinio juris* is impossible to demonstrate. *Id.*

78. See A. D'AMATO, *supra* note 42, at 51-52 (contention that *opinio juris* is impossible to prove because nations motives are unknowable).

79. See A. D'AMATO, *supra* note 42, at 74. *Opinio juris* occurs whenever a publicized statement exists that contends a certain principle is custom. *Id.* Journals, textbooks, and reports of legal decisions are prime examples of sources that articulate a principle as custom thereby giving other states notice that the principle is custom. *Id.* at 85-86; see also Akehurst, *supra* note 43, at 37 (*opinio juris* based on nations' comments about content of customary law even if state does not honestly believe the practice is custom).

80. See A. D'AMATO, *supra* note 42, at 74.

81. Akehurst, *supra* note 43, at 34 (if consistent state practice exists, courts should assume practice is custom unless evidence of *opinio non-juris* exists).

82. See Akehurst, *supra* note 43, at 39. If states acquiesce to another state's action, a permissive rule of customary law arises, and, conversely, if a state's actions encounter protests, the legality of the action is doubtful. *Id.*; see also A. D'AMATO, *supra* note 42, at 68 (one group of experts equates *opinio juris* with consent, acquiescence, or lack of protest).

83. See *supra* note 82 (protest can prevent custom from arising).

84. *Id.* (acquiescence in state practice can cause act to become custom).

The concept of protest and acquiescence directly relates to another principle of international law known as the rule of dissent which allows an individual state to prevent an emerging custom from becoming binding on that state by opposing the customary rule at its inception and consistently thereafter.⁸⁵ In the *Fisheries Case*,⁸⁶ the I.C.J. recognized the rule of dissent, holding that the rule limiting territorial sea baselines to not more than ten miles across bays was not applicable to Norway because Norway had opposed every attempt to apply the ten-mile rule to the Norwegian Coast.⁸⁷ The Reagan administration similarly believed the deep seabed provisions of the LOS Convention did not apply to the United States because the United States dissented to the Third World's interpretation of the common heritage principle.⁸⁸ To claim a right of transit passage or an EEZ, however, the United States must show that the relevant provisions of the Convention either create or embody customary law.⁸⁹

Most experts believe that treaties can supply evidence of customary law.⁹⁰ Treaties either can codify pre-existing custom or can provide the impetus for the creation of new custom.⁹¹ The Vienna Convention on the Law of Treaties

85. See Akehurst, *supra* note 43, at 24 (state can prevent emerging custom from becoming binding by opposing rule in earliest days of formation and persistently opposing rule thereafter); Arrow, *supra* note 28, at 4 (persistent and timely protest by state may render emerging custom inapplicable against protesting state). Once a custom has become binding on a state, that state is bound forever. Akehurst, *supra* note 43, at 24. The protesting state must disclaim the custom before the custom becomes well established. *Id.* Moreover, if a state protests a custom in the formative period but ceases to protest thereafter, the custom will become binding. *Id.*

86. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116. In the *Fisheries Case*, England attempted to limit Norway's right to draw baselines for Norway's territorial sea. See F. KIRGIS, *supra* note 40, at 63. Along Norway's north coast the Norwegian government drew straight baselines along the seaward points of the skyjaerguard, 120,000 small islands which dot the coast. *Id.* By measuring the territorial sea from the skyjaerguard baselines, Norway seriously cut back England's traditional right to fish in the area. *Id.* at 64. England asserted that Norway should measure the baseline from the coastline, not the skyjaerguard, and that Norway should use baselines that contour the coastline, except that across bays less than 10 miles wide the use of straight baselines would be permissible. *Id.* The I.C.J. held that Norway could draw baselines along the skyjaerguard because England acquiesced in Norway's action. *Fisheries Case*, 1951 I.C.J. at 139. Moreover, the rule limiting straight baselines would not apply to Norway because Norway always had opposed the 10-mile rule. *Id.* at 131.

87. 1951 I.C.J. at 131; see also *supra* note 86 (*Fisheries Case*).

88. See Lee, *The Law of the Sea Convention & Third States*, 77 AM. J. INT'L L. 541, 541 n.3 (1983) (Reagan Administration officials claim that American mining interests cannot be bound to deep seabed regime without consent of United States to LOS Convention).

89. See *id.* at 552. Non-signatory states asserting rights under the Convention must demonstrate the asserted rights are customary international law. *Id.*

90. See Akehurst, *supra* note 43-44 (treaties can create custom but must also have element of *opinio juris*); T. BROWNIE, *supra* note 5, at 11 (law-making treaties can create custom). Not all treaties, however, are capable of creating custom. T. BROWNIE, *supra*, at 12 (treaties executed to accomplish a single enterprise cannot create custom); A. D'AMATO, *supra* note 42, at 106 (treaties that create international regimes cannot establish custom).

91. See *North Sea Cases*, 1969 I.C.J. at 42 (one recognized method of creating custom is transformation of general rule in convention into custom when general rule acquires *opinio juris*); A. D'AMATO, *supra* note 42, at 104 (treaties have profound effect on customary law for non-parties); Lee, *supra* note 88, at 553 (by process of codification and progressive development of customary law, treaties crystallize customary international law).

codifies the principle that treaties can embody custom.⁹² Generally, treaties that speak in a declaratory mode, promulgating general rules, are capable of creating custom.⁹³ Certain types of treaties are also likely to create or evidence custom, including treaties which add precision to previous customary law⁹⁴ or treaties which create new law when dissatisfaction with the prior law exists.⁹⁵ In contrast, certain types of treaties cannot create customary law.⁹⁶ A treaty executed solely to accomplish a single objective will not create custom.⁹⁷ Furthermore, a treaty establishing an international organization or regime will not create custom if the treaty merely declares the rules that govern the organization or regime.⁹⁸ These types of treaties do not create or evidence custom because they declare specific rules that are incapable of creating the broad, generalized standards that are the basis of customary law.⁹⁹

In the *North Sea Cases*, the I.C.J. analyzed whether a convention could

92. Vienna Convention of Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 8 INT'L LEGAL MATERIALS 670 (1969) [hereinafter cited as Vienna Convention]. Article 38 of the Vienna Convention provides that nothing in the Convention precludes a rule set forth in a treaty from becoming binding on non-parties as a customary rule of law. Vienna Convention, *supra*, art. 38.

The Vienna Convention is the United Nations treaty that specifically addresses the issues of treaty law and interpretation. See I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, 10 (1973). The Vienna Convention governs the formation, operation, and termination of treaties. *Id.* at 6. The Vienna Convention also defines the rights and obligations of non-signatory states. See Vienna Convention, *supra*, art. 35-36 (treaty does not create rights or obligations for third state without third states' consent). For the United States to receive the benefit of an EEZ or a right of transit passage from the LOS Convention, the United States must show either the parties to the Convention intended the United States to have these benefits or the rights under the Convention are customary law. Lee, *supra* note 88, at 546, 553. From statements made at the opening ceremony, the intent of the signatories of the LOS Convention not to confer any benefits on the United States is clear. See *id.* at 552. The United States, therefore, must demonstrate that an EEZ and a right of transit passage are custom to derive any benefits from the Convention. *Id.* at 553.

93. T. BROWNLIE, *supra* note 5, at 12; A. D'AMATO, *supra* note 42, at 107. Examples of treaties which create general norms that bind all nations include the Hague Conventions of 1899 and 1907 (on neutrality during maritime war), the Geneva Protocol of 1925 (on illegal weapons in warfare), and the Genocide Convention of 1948 (prohibiting practice of genocide). See T. BROWNLIE, *supra* note 5, at 12.

94. Akehurst, *supra* note 43, at 52.

95. *Id.* A treaty that resolves state dissatisfaction with pre-existing law will not create custom if the treaty does not reflect or generate consistent state practice. *Id.* For example, capitalist and communist states have conflicting views on compensation due for personal or corporate property appropriated by a foreign nation. *Id.* at 51. Capitalist countries claim full compensation for appropriated property, while communist nations find no need to pay any compensation. *Id.* Several treaties exist which attempt to settle capitalist and communist dissatisfaction with appropriation law. *Id.* at 51-52. No custom has arisen, however, because capitalist countries still demand full compensation and communist countries still claim no compensation. *Id.*

96. See *supra* note 90 (types of treaties that can and cannot create custom).

97. T. BROWNLIE, *supra* note 5, at 12.

98. A. D'AMATO, *supra* note 42, at 106.

99. See *supra* text accompanying note 93 (treaties that create general norms can create custom); see also A. D'AMATO, *supra* note 42, at 106 (only treaties with general, norm-creating rules can create custom).

create or embody custom.¹⁰⁰ The *North Sea Cases* involved a dispute over the continental shelf in the English Channel.¹⁰¹ Denmark and The Netherlands admitted that provisions of the 1958 Convention on the Continental Shelf (Continental Shelf Convention)¹⁰² delimiting the continental shelf did not apply to Germany because Germany had not signed the 1958 Convention.¹⁰³ Denmark and The Netherlands, however, claimed that the 1958 Convention should bind Germany because the treaty embodied customary law.¹⁰⁴ The I.C.J. found that the 1958 Convention did not bind Germany because the use of the equidistance principle¹⁰⁵ to delimit the continental shelf was experimental.¹⁰⁶ The I.C.J. determined that the equidistance principle was, at most, *lex ferenda*,¹⁰⁷ and, therefore, could not be the basis for custom.¹⁰⁸ In addition, the treaty allowed reservations to the delimitation provisions that demonstrated to the I.C.J. that no intent existed to make the delimitation provisions norm-creating.¹⁰⁹ The equidistance principle, therefore, was inappropriate as custom.¹¹⁰

In the alternative, the Dutch and Danish argued that even if the Continental Shelf Convention had not codified custom at the time of signing, the number of ratifications coupled with subsequent state practice had placed the principle of equidistance on the level of custom.¹¹¹ The I.C.J. acknowledged that a widespread and representative participation in a convention might suffice to create custom, provided the specially affected nations¹¹² also participated.¹¹³ The I.C.J., however, determined that the equidistance principle could not represent custom.¹¹⁴ The I.C.J. noted that under the 1958 Convention the primary method of delimiting the continental shelf was agreement among the parties.¹¹⁵ The court held that the equidistance principle was a secondary method of delimitation used only when the parties failed to reach agreement.¹¹⁶ The I.C.J. concluded that a secondary remedy was not capable of creating custom because the principle was not stated as a general rule of

100. See *North Sea Continental Shelf Cases* (W. Ger. v. Den. & Neth.) 1969 I.C.J. 4; see also Lee, *supra* note 88, at 561-562.

101. *North Sea Cases*, 1969 I.C.J. at 12-13.

102. Continental Shelf Convention, *supra* note 5; see *supra* text accompanying notes 10-12 (provisions of Convention).

103. *North Sea Cases*, 1969 I.C.J. at 25.

104. *Id.* at 28.

105. See *supra* note 54 (equidistance principle).

106. *North Sea Cases*, 1969 I.C.J. at 38.

107. See T. BROWNLIE, *supra* note 5, at xxxv (*lex ferenda* means law as it should be if in accordance with good policy).

108. *North Sea Cases*, 1969 I.C.J. at 38.

109. *Id.* at 38-39.

110. *Id.*

111. *Id.* at 41.

112. See *supra* text accompanying notes 64-68 (explanation of specially affected nations).

113. *North Sea Cases*, 1969 I.C.J. at 42.

114. *Id.* at 45.

115. *Id.* at 42.

116. *Id.*

law.¹¹⁷ Additionally, the number of ratifications and accessions was not sufficiently large, nor did it include enough specially affected states, to create custom.¹¹⁸ As of the time of the *North Sea Cases* decision, the Continental Shelf Convention had received thirty-nine ratifications or accessions.¹¹⁹ The I.C.J. concluded that this number was respectable, but not sufficient to create custom.¹²⁰ The I.C.J. reasoned that determining why other nations had not ratified would constitute mere speculation.¹²¹ Thus, declarations that states failed to ratify for reasons other than disapproval¹²² of the 1958 Convention provisions are merely conjecture.¹²³ The I.C.J. held that mere conjecture could not constitute a basis for concluding that non-ratifying states held the Continental Shelf Convention to be binding customary law.¹²⁴

The I.C.J. also analyzed the conduct of the nations that had actually used the equidistance principle to delimit a continental shelf.¹²⁵ The I.C.J. noted that in fifteen cases the equidistance principle was the method used to delimit a continental shelf.¹²⁶ In over half of the situations, the nations using the equidistance principle either were, or became shortly thereafter, parties to the Convention on the Continental Shelf.¹²⁷ The I.C.J. held that the actions of those nations already parties to the Continental Shelf Convention could not supply evidence that the equidistance principle was custom.¹²⁸ The I.C.J. reasoned that determinations of why states which were not parties to the 1958 Convention used the equidistance principle would be speculative.¹²⁹ The I.C.J. therefore refused to infer that any state ever used the principle believing its use to be obligatory under international law.¹³⁰ The I.C.J. concluded that the conduct of the nations that actually used the equidistance principle provided no evidence of the principle's customary nature because the element of *opinio juris* did not exist.¹³¹

The I.C.J.'s analysis of custom in the *North Sea Cases* controls in determining whether the LOS Convention embodies or generates custom.¹³² The

117. *Id.*

118. *Id.*

119. *Id.* at 25.

120. *Id.* at 42; see also text accompanying notes 51-56 (sufficiency of practice).

121. *North Sea Cases*, 1969 I.C.J. at 42.

122. See Akehurst, *supra* note 43, at 49 (most frequent reasons for failure to ratify are inertia and parliamentary complications).

123. *North Sea Cases*, 1969 I.C.J. at 42.

124. *Id.*

125. *Id.* at 43.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 43-44.

130. *Id.*

131. See *id.* at 44 (I.C.J. stressed that both state practice and *opinio juris* must exist to create custom).

132. See *supra* text accompanying notes 100-131 (*North Sea Cases*); see also A. D'AMATO, *supra* note 42, at 120 (*North Sea Cases* are most explicit opinion of I.C.J. regarding treaty generation of custom); Lee, *supra* note 88, at 561 (*North Sea Cases* set conditions for convention to acquire status as custom).

LOS Convention's provisions on an EEZ and a right of transit passage fulfill the primary requirement that only generally stated rules can become custom.¹³³ The EEZ and transit passage provisions possess widespread and representative support, as demonstrated by the large and diverse number of signatories on opening day.¹³⁴ In addition, even the non-signatory nations overwhelmingly embraced the right of transit passage.¹³⁵ Although some expert opinion supports the contention that the right of transit passage will be custom,¹³⁶ not all commentators believe the United States' right of transit passage is secure.¹³⁷ The United States essentially has acknowledged that transit passage is not a customary right through its willingness to give developing countries a twelve-mile territorial sea in return for guaranteed passage through international straits.¹³⁸ Moreover, consensus at the Convention is virtually the only existing actual state practice to support a right of transit passage, whereas prior state practice amply supports the right to claim an EEZ.¹³⁹ In the *Tunisia-Libya Continental Shelf Case*, the I.C.J. recognized that the right to an EEZ is customary international law.¹⁴⁰ Thus, the consensus at the Convention, the prior state practice, and the ruling in the *Tunisia-Libya Continental Shelf Case* clearly demonstrate that the right to an EEZ has the virtual uniformity of state practice required to create custom.¹⁴¹ Whether the right of transit passage meets the requirement for virtual uniformity, however, is less clear because no actual state practice relating to transit passage exists and numerous states have declared that non-signatories will not receive any rights.¹⁴² Assuming,

133. See *supra* text accompanying note 93 (treaty declaring general principles most likely to create custom); *supra* text accompanying note 109 (I.C.J. holds that equidistance principle is not custom because not norm-creating).

134. See *supra* text accompanying notes 33-34 (Convention signed by largest and most diverse number of nations in history).

135. See Lee, *supra* note 88, at 563 n.101 (transit passage fulfills requirement for widespread and representative participation because even non-signatories supported provision).

136. See Howard, *supra* note 49, at 332 (right of transit passage probably will become custom).

137. See Lee, *supra* note 88, at 559 n.81 (American Branch of International Law Association believes right to transit passage is not fully secure); Richardson, *supra* note 14, at 511 (failure to sign treaty endangers right of transit passage); Zuleta, *supra* note 1, at 478 (view that transit passage right is custom is not widely accepted).

138. See Lee, *supra* note 88, at 559 (conceding 12-mile territorial sea rights in return for transit passage right effectively admits transit passage right not custom).

139. Compare *supra* text accompanying notes 33-34 (Convention signed by consensus) with *supra* note 49 (UNCLOS III all but formally agreed that EEZ was custom) and *Law of Sea, supra* note 8, at 569 (same).

140. Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya), 1982 I.C.J. 18, 74. The conflict between Libya and Tunisia arose when the two countries could not agree on a method to delimit the continental shelf that is an integrated part of both countries land mass. *Id.* at 32. Addressing Tunisian claims to historically used waters, the I.C.J. declared that Tunisia could have used the concept of an EEZ, which the I.C.J. held was part of modern international law, to justify claims to historical waters. *Id.* at 74. Tunisia, however, failed to argue for rights based on an EEZ. *Id.*

141. See *supra* text accompanying notes 112-113 (*North Sea Cases* hold that widespread and uniform state participation in convention might create custom).

142. See Lee, *supra* note 88, at 552 (most signatories intend non-signatories to receive no rights).

however, that the LOS Convention demonstrates uniform state practice regarding transit passage, sufficient participation eliminates the need to show that the right of transit passage and the right to an EEZ satisfy the requirement for passage of time.¹⁴³

Even if extensive state practice supports the right to an EEZ and a right of transit passage, the United States also must demonstrate the element of *opinio juris* before relying on these concepts as custom.¹⁴⁴ The theory of the Convention as a "package deal"¹⁴⁵ makes a demonstration of *opinio juris* difficult because most signatories claim that non-signatories will receive no benefits.¹⁴⁶ The Third World agreed to provide a right of transit passage only as a *quid pro quo* for other concessions at UNCLOS III.¹⁴⁷ The Third World's belief that signatories can withhold the right of transit passage from any nation that fails to sign the LOS Convention demonstrates the practice is not binding and thus lacks *opinio juris*.¹⁴⁸ The United States, however, can contend that the package deal and the intent of signatories to refuse rights to non-signatories does not demonstrate a lack of *opinio juris*.¹⁴⁹ The package deal theory essentially labels the LOS Convention as a compromise document.¹⁵⁰ Numerous examples exist of conventions that incorporated compromise and eventually rose to the status of customary law.¹⁵¹ Moreover, certain expert opinion declares that the intent to withhold rights from non-signatories is irrelevant because subsequent state practice actually creates custom.¹⁵² In addition, the United States can point to several factors that support the contention that *opinio juris* exists.¹⁵³ Primarily, the recognition by one-hundred and nineteen widely diverse nations that an EEZ and right of transit passage are law demonstrates *opinio juris*.¹⁵⁴ The LOS Convention further corroborates custom by its prohibition

143. See *supra* text accompanying note 60 (*North Sea Cases* require little passage of time if participation in treaty is sufficient).

144. See *supra* text accompanying note 42 (*opinio juris* and state practice required to show custom).

145. See *supra* note 1 (package deal).

146. See Lee, *supra* note 88, at 552 (non-signatories receive no rights).

147. See *id.* at 559, 566-67 (Convention provisions based on concessions between differing groups of nations).

148. See *supra* text accompanying notes 70-72 (*opinio juris* exists only when nations believe practice is binding).

149. See *infra* text accompanying notes 150-152 (signatories intent irrelevant if rights claimed are custom).

150. See Lee, *supra* note 88, at 567 (multilateral treaties always involve compromise).

151. See *id.* The Convention on the Territorial Sea and Contiguous Zone compromised on issues of shipping, fishing, and military security, yet third states receive the compromise rights as custom. *Id.*; Territorial Sea Convention, *supra* note 5.

152. See A. D'AMATO, *supra* note 42, at 150-153. Limiting the scope of a treaty to the intentions of the contracting parties is open to objections. *Id.* First, the intent of the parties is difficult to discern. *Id.* Moreover, the basis of custom is the behavior of the international community, and therefore the signatories' intent is irrelevant. *Id.*

153. See *infra* text accompanying notes 154-155 (consensus and prohibition of reservations partially demonstrate *opinio juris*).

154. See *supra* note 34 (Convention signed by largest consensus of nations ever).

of reservations which, at least partially, demonstrates to the I.C.J. the binding nature of the Convention.¹⁵⁵ The United States also can argue that because the Convention is the product of dissatisfaction with pre-existing law, it likely will achieve status as custom.¹⁵⁶ The United States' contention that the signatories' intent is irrelevant will probably not, however, support a right of transit passage. The signatories that intend to deny transit passage rights to third states are so numerous as to nearly insure that no state practice will arise based on the notion that transit passage is an obligatory, customary right.¹⁵⁷ Moreover, the United States may find claiming a transit passage right problematic in the face of an American court's refusal to grant customary rights to individuals whose nations had not signed a treaty embodying custom.¹⁵⁸ In *United States v. Cadena*,¹⁵⁹ the Fifth Circuit reasoned that a convention does not benefit non-signatories, even if the treaty embodies custom, if no evidence exists that signatories intended to confer rights on non-signatories.¹⁶⁰ The *Cadena* decision supports the contention of LOS Convention signatories that the United States may not claim a right of transit passage.¹⁶¹

The common heritage principle, which declares that exploitation of seabed resources should benefit all nations,¹⁶² is also a product of dissatisfaction with pre-existing law.¹⁶³ Thus, common heritage has some basic indicia of custom.¹⁶⁴ The Reagan Administration, however, believes that the common heritage principle is not customary law but rather a non-binding concept created by a General Assembly resolution.¹⁶⁵ The United States does not oppose the basic notion of the seabed as man's common heritage.¹⁶⁶ The United States' opposition focuses on the Third World's interpretation of the common heritage

155. See *supra* text accompanying notes 109-110 (no *opinio juris* because presence of reservations indicates that law is not binding); see also Convention, *supra* note 1, art. 309 (reservations prohibited).

156. See *supra* text accompanying note 95 (treaty alleviating dissatisfaction with previous law).

157. See *supra* note 34 (Convention signed by largest number of nations in history); see also Lee, *supra* note 88, at 552 (most signatories intend non-signatories to receive no rights).

158. See *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (convention confers no rights to non-signatories unless parties to treaty so intend).

159. 585 F.2d 1252 (5th Cir. 1978).

160. *Id.* at 1261. The *Cadena* decision completely ignores that the treaty in question conferred customary rights regardless of the intent of the parties to the convention. Lee, *supra* note 88, at 543 n.7.

161. See Lee, *supra* note 88, at 552 (most signatories intend non-signatories to receive no rights).

162. See *supra* note 28 (common heritage).

163. See R.P. ANAND, *supra* note 15, at 196 (common heritage principle based on Third World dissatisfaction with inability to share in resource exploitation).

164. See *supra* text accompanying note 95 (treaty alleviating dissatisfaction with previous law likely to achieve status as custom).

165. See Brown, *Freedom of the High Seas Versus the Common Heritage of Mankind*, 20 SAN DIEGO L. REV. 521, 542 (United States believes Declaration of Principles is non-binding); see also U.N. CHARTER, ch. IV (General Assembly resolutions are not binding).

166. See *supra* note 28 (United States supported common heritage principle by voting for Declaration of Principles).

principle as customary law.¹⁶⁷ The Reagan Administration also believes that in the absence of a uniformly adopted treaty embodying the common heritage principle, the right to mine the deep seabed is a high seas freedom analagous to the right to fish.¹⁶⁸ Reagan believes that establishing a regime outside the LOS Convention to mine the deep seabed is possible by negotiating treaties with other non-signatories who desire to mine the seabed.¹⁶⁹ Few industrialized nations capable of mining the deep seabed will be willing, however, to sign such treaties.¹⁷⁰ Even in the absence of mining rights supplied by the Convention or treaties with other non-signatories, Reagan believes that the United States can fulfill much of its resource needs by mining within the United States' EEZ.¹⁷¹ The Aleutian Islands, for example, are in an area with great potential for seabed exploitation.¹⁷² The Reagan Administration's position that the United States is not bound by the Convention provisions on the deep seabed is correct because the *North Sea Cases* require the specially affected nations to participate in an extensive and virtually uniform fashion.¹⁷³ The participation in the LOS Convention by the specially affected nations, those capable of seabed mining within the foreseeable future, is neither extensive nor uniform.¹⁷⁴ The failure of the specially affected nations to sign the Convention because of the seabed provisions is not fatal to the proposition that common heritage is custom, however, if the principle was custom before the Convention.¹⁷⁵

The Third World nations argue that the common heritage principle is custom because the United States has advocated the use of the common heritage principle since 1966 and participated in the consensus that passed the Declaration of Principles Governing the Seabed and Ocean Floor (Declaration of Principles) which proclaimed the seabed as the common heritage of mankind.¹⁷⁶ The United States' approval of common heritage during the Declarations' period of development may prevent the United States from effectively claiming the United States opted out of the principle by consistent dissent.¹⁷⁷ Experts

167. See Brown, *supra* note 165, at 545-46 (developed nations believe common heritage has no status as law until they sign a treaty embodying principle).

168. 20 SAN DIEGO L. REV. 679, 702 (United States' formal position is that deep seabed mining is high seas freedom).

169. See Brown, *supra* note 165, at 523 (Reagan Administration wants to establish seabed regime by unilateral treaties).

170. See Larson, *The Reagan Administration and the Law of the Sea*, 11 OCEAN DEV. & INT'L L. 297, 315 (1982) (industrialized nations will not sign exploitation treaties with United States because treaties would adversely affect developed countries' foreign relations).

171. 20 SAN DIEGO L. REV. 679, 687 (1983).

172. *Id.*

173. See *supra* text accompanying notes 112-113 (*North Sea Cases*).

174. See Oxman, *supra* note 22, at 156 (countries capable of mining seabed did not sign Convention).

175. See Lee, *supra* note 88, at 553 (treaty simply can codify customary law that already exists).

176. See *supra* note 28 (United States support of common heritage through Declaration of Principles).

177. See *supra* text accompanying note 85 (early dissent to emerging custom required).

contend that the United States is currently acquiescing in the common heritage principle.¹⁷⁸ In addition, the president of UNCLOS III has threatened to invoke the advisory jurisdiction of the I.C.J. and seek a declaration by the court that common heritage is custom if the United States attempts to mine the deep seabed.¹⁷⁹ The United States' official view, however, is that the Declaration of Principles is a non-binding United Nations resolution.¹⁸⁰ Support exists for the view that the United States has dissented to the formation of common heritage as custom by voting against the 1969 Moratorium and by passing the Deep Seabed Hard Mineral Resources Act of 1980.¹⁸¹ Thus, even though the industrialized nations have supported the common heritage principle, the rule of dissent should operate to prevent the common heritage principle from binding the industrialized nations because these nations have consistently reiterated the view that common heritage is a non-binding principle until a convention codifying the subject is agreed upon.¹⁸²

After an analysis of the LOS Convention, a definitive determination that any provisions of the Convention embody custom is unlikely. Ample evidence exists that the right to an EEZ was customary law before the LOS Convention.¹⁸³ President Reagan, therefore, should be able to sustain his claim of an EEZ.¹⁸⁴ Beyond the question of an EEZ, however, existence of absolute rights is less clear.

The right of transit passage fulfills the *North Sea Cases* requirement for widespread and general support by the international community.¹⁸⁵ The requirement of consistent state practice may be difficult to demonstrate because no actual state practice exists to support a right of transit passage beyond the consensus at the Convention.¹⁸⁶ Moreover, international law experts do

178. See Arrow, *The Proposed Regime for the Unilateral Exploitation of Deep Seabed Mineral Resources by the United States*, 21 HARV. INT'L L.J. 337, 393 (1980) (Congress established common fund that will benefit developing nations in event of United States' seabed exploitation) [hereinafter cited as *Regime on Seabed Exploitation*].

179. See Brown, *supra* note 165, at 523.

180. See *supra* text accompanying note 165 (General Assembly resolutions are non-binding).

181. See G.A. Res. 2574, 24 U.N. GOAR, U.N. Doc. A/7630 (1969) (Moratorium declared recognition of seabed claims would not occur until regime established); The Deep Seabed Hard Mineral Resources Act, 20 U.S.C. § 1401 (Supp. 1981) [hereinafter cited as the Act]. The legal premise of the Act is that deep seabed mining is a high seas freedom. See *Regime on Seabed Exploitation*, *supra* note 178, at 338. Moreover, the Act holds that title to deep sea nodules vests at capture. *Id.* The Act allows United States mining companies to mine the seabed under the aegis of United States law. 20 SAN DIEGO L. REV. 679, 702 (1983). The Act also controls licensing and issuance of permits to mine the seabed and attempts to afford deep seabed miners protection from conflicting claims. *Id.*

182. See Brown, *supra* note 165, at 555 (industrialized nations claim common heritage has no effect until included in acceptable convention).

183. See *supra* text accompanying notes 139-141 (consensus at LOS Convention, state practice, and I.C.J. recognize EEZ is custom).

184. *Id.*; see also Proclamation No. 5030, 48 FED. REG. 10,605.

185. See *supra* text accompanying notes 134-135 (transit passage right has widespread support).

186. See *supra* text accompanying note 139 (no state practice to support right of transit passage).

not all agree that state claims alone can be the basis of state practice.¹⁸⁷ In addition to problems in demonstrating adequate state practice, the United States will probably be unable to demonstrate the element of *opinio juris*.¹⁸⁸ Most signatories believe that the right of transit passage can be withheld from non-signatories.¹⁸⁹ Thus, the element of *opinio juris* is missing because signatories do not believe that granting a right of transit passage is obligatory under international law.¹⁹⁰ Moreover, in *Cadena* one American court refused to grant customary rights to individuals of non-signatory countries, even though the rights arose from a convention that embodied custom.¹⁹¹ The *Cadena* decision supports the LOS Convention signatories' contention that the United States may not claim a right of transit passage.¹⁹² If the United States cannot claim a right of transit passage, however, American ships will continue to have the traditional right of innocent passage.¹⁹³

The LOS Convention provisions on the International Seabed Authority will not bind the United States because the Convention provisions creating the Authority are not broad, general rules capable of becoming custom.¹⁹⁴ If the I.C.J. declares the common heritage principle customary law, however, the United States will not be free to mine the deep seabed, despite the Authority's lack of jurisdiction over American mining companies.¹⁹⁵ The United States should be able to use the rule of dissent to deflect the effect of the common heritage principle because the United States has consistently opposed the principle as binding law.¹⁹⁶ The mere threat, however, that the I.C.J. will declare the seabed the common heritage of mankind creates a risk in deep seabed mining that outweighs the mining companies' interests in investing the initial capital necessary to mine the deep seabed.¹⁹⁷ Thus by creating a financial risk the common heritage principle may preclude American companies from mining the seabed even though the United States has strong arguments that the principle is not binding on the United States.¹⁹⁸ Ultimately, Reagan's failure to authorize signature of the Convention does nothing to help American mining interests but instead compromises the country's need for a right of transit passage and further tarnishes its image abroad.¹⁹⁹

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187. See *supra* note 44 (conflict over what constitutes state practice).

188. See *supra* text accompanying notes 144-148 (no *opinio juris*).

189. *Id.*

190. *Id.*

191. See *supra* text accompanying notes 159-160.

192. See *supra* text accompanying note 161.

193. See Lee, *supra* note 88, at 560-561 (non-signatories' right of innocent passage is still custom).

194. See *supra* text accompanying note 98 (international regimes cannot become custom).

195. See Richardson, *supra* note 14, at 509 (if I.C.J. declares common heritage to be custom, deep seabed mining outside Convention will be illegal).

196. See *supra* text accompanying note 182.

197. See *supra* note 37 (without 20-year guaranteed access to mining areas, no company will gamble necessary \$1.5 billion).

198. See *supra* text accompanying note 182 (United States not bound by common heritage).

199. Richardson, *supra* note 14, at 511.

