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Chapter 1: International Law, Adoption of the Law of the Sea Convention

Customary International Law and the Adoption of the Law of the Sea Convention

Introduction to Customary International Law

International law is comprised of treaties and customary international law. Customary international law is established through the actions that States take out of a sense of legal obligation. International law changes through changing treaty regimes, as well as through new and different legal norms that States assume based on what they deem to be the law governing emerging issues. Customary international law, and in recent years, treaty law, have played a central and continuing role in the evolution of the law of the sea.

In contrast to treaties, which are written and more easily researched and cited to, the reasoning behind customary international law can be harder to discern. The prevailing U.S. view of determining and interpreting international law is very similar to other widely accepted methods of international jurisprudence. A comparison of the international view and the U.S. view illustrates the similarities.

The U.S. Constitution includes treaties as part of "the supreme law of the land" and refers to the "Law of Nations" (as customary international law was called at the time of its drafting).3

Though international custom changes over time, it is still binding and recognized as law around the world. Not everything will be overtly agreed to by a State, however, "a customary rule is observed, not because it has been consented to, but because it is believed to be binding…its binding force does not depend…on the approval of the individual or the State to which it is addressed."4 Customary international law is determined by looking at two things: state practice and opinio juris. The International Court of Justice has stated that "[n]ot only must the acts concerned amount to 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." 5

State Practice

Traditionally, a particular practice of States does not need to be universally followed by States to qualify as custom. It needs merely to be generally and consistently practiced by a representative group of States capable of participating in the practice. State practice is shown by the actions taken by States. The reasoning behind a State's actions is also considered so as to eliminate any accidental State practice, and only focus on what States mean to do. Much of the Law of the Sea Convention (LOSC) reflects the practices of States before the treaty was made.

Opinio juris sive necessitas ("an opinion of law or necessity")

Opinio juris occurs when States act out of a belief that they are either forbidden from doing something or compelled to do it by international law. It differentiates what a State does out of a legal obligation and what a State does out of regular courtesy or comity. Opinio juris is demonstrated through various means. Most of the Convention was written to reflect the sense of obligation that States already felt towards each other regarding law of the sea.

Problems with Customary International Law

Customary international law can be difficult to define with precision. It is difficult to determine when an international custom has changed, and at what point, if ever, a state's non-compliance with international custom becomes a new custom or is merely a violation of existing law. Customary international law is easiest to show when codified in treaty frameworks. The Third Restatement on Foreign Relations Law states that "[i]nternational agreements constitute practice of States and as such can contribute to the growth of customary international law."6 Generally, if a treaty represents international custom, even States that are not parties to the treaty are held to the custom's standard.

History of the Law of the Sea

The law of the sea is simultaneously one of the oldest and one of the newest bodies of international law. From the time the seas began to be used for the conduct of commerce and war, politicians, merchants, and scholars have debated who could use the sea and who could control it. Freedom of the seas has taken many forms over the centuries. From the 17th century, a State's rights and jurisdiction on the ocean were limited to a specific belt of water extending from the coastlines. For many years, a country's territorial waters extended as far as a shore battery could fire, and all waters beyond this were considered international waters (free seas, or mare liberum). As described by Hugo Grotius, the father of modern international law, the seas "were free to all nations but belonged to none of them."

The tension between "the free sea" and "the closed sea" waxed and waned for centuries, generally with the powerful arguing that the sea was free to all, and the smaller States arguing for transnational limitations on what maritime powers could do to navigate the oceans and exploit their resources. Political, strategic, and economic issues are reflected in the historical tension between the exercise of state sovereignty over the sea and the idea of "the free sea." By the 19th century the concept of the free

seas, open to all, was the prevalent view, reflecting the dominance of large maritime powers, and Great Britain in particular, thus fostering a body of law that favored free navigation and the conduct of both commerce and naval operations across the world's oceans.

Background of the Law of the Sea Convention

The Law of the Sea Convention (the "Convention" or "LOSC"), is binding on the States that are party to it, as well as other States (including the U.S.), to the extent that it represents customary international law. The Convention is the cumulative result of decades of diplomacy and is based on centuries of relevant practice and jurisprudence. At the time of the creation of the Convention, there was much talk about:

"marine resources being exhaustible and in need of conservation; and that is the case again today, when the maritime powers coexist in equilibrium upon the pivot of mutual deterrence and cannot prevail over the host of small States that have tended to usurp their authority."7

No agreement came from efforts by the League of Nations in the early 1930s to decide on extending State claims of sovereignty over adjacent waters. In 1945, President Harry S. Truman extended the U.S.'s control to all the natural resources on its continental shelf, under the customary international law principle that a nation has a right to protect its natural resources. Chile, Peru, and Ecuador followed that example, extending their claim to 200 nautical miles to include their fishing grounds. Most States extended their territorial waters to 12 nautical miles. In subsequent years, various attempts were made to create a broad-spectrum law of the sea regime that ultimately culminated in the creation of the present Convention.

First and Second Conferences on the Law of the Sea

The first off-shore oil rig out of the sight of land started producing in 1947, and there was slow growth of off-shore operations through the 1950s. In the 1960s there was a boom in activity and technology; platforms began drilling thousands of feet below the surface and could be located further and further from shore. During the same period, advances were made in fishing. Vessels increased in size and could travel further from port and stay out longer. Nations began to exploit distant fishing waters without restraint.

Issues of geopolitics and nationalism, in addition to interest in oceanic resources, amplified the desire of States to assert sovereign rights over increasingly larger areas of the ocean. All of these trends increased the pressure to adapt the principles of customary law of the sea to a changing world environment.

In 1956 the U.N. convened its first Conference on the Law of the Sea. Ending in 1958, the result of the first Conference was four treaties: The Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of Living Resources of the High Seas. These treaties entered into force between 1962 and 1966. Though the Conference was heralded as a success, it failed to address some key issues, including the issue of the breadth of territorial waters over which coastal States could assert broad sovereign rights. The U.N. held a second Conference in 1960, but it only lasted six weeks, and no new agreements came of it.

Third Conference on the Law of the Sea

The unanswered issue of territorial waters needed to be resolved. In 1966, President Lyndon B. Johnson referred to the deep sea and the seabed as the legacy of all humans. The following year, the Ambassador to the UN from Malta, Arvid Pardo, presented a proposal to the UN General Assembly declaring that the seabed should be part of the common heritage of mankind. In 1973 the third Conference on the Law of the Sea convened in New York. For nine years States negotiated over the parameters of the law of the sea until the Convention was completed in 1982.

The U.S strongly supported the initiative of the third Conference and played a leading role in its negotiation over the course of the Nixon, Ford and Carter administrations. U.S. negotiators focused on preserving principles of freedom of navigation and other vital security concerns, as well as protecting the right of the U.S. to conserve and exploit the resources of the continental shelf and the 200-nautical mile exclusive economic zone. The U.S. negotiators were successful in these efforts.

Objections to U.S. ratification of the LOSC as originally negotiated largely focused on Part XI of the LOSC, which governs management of the deep seabed and provides for compulsory dispute resolution through the Seabed Disputes Chamber.8 The U.S. objections initially resulted in some degree of uncertainty over the future of the treaty. Following the lead of the U.S., many other developed States declined to ratify the Convention.

To address the concerns preventing the U.S. and other States from joining the LOSC, in 1994 the UN General Assembly (UNGA) negotiated what became known as the Agreement Relating to the Implementation of Part XI of the United Nations Law of the Sea (hereafter referred to as the Agreement). The Agreement is intended to be interpreted along with Part XI of the Convention, and addresses concerns developed nations had regarding the exploitation of the deep seabed and its administration. In the case of any conflict or contradiction between the texts or their interpretations, the text of the Agreement is to prevail. Any States ratifying the Convention following implementation of the Agreement are also bound by the Agreement. States which ratified the Convention before the Agreement may consent to the Agreement separately.

Heralded as a "Constitution of the Sea" the Convention came into force in 1994, and as of June 2016 168 parties have joined the Convention. The U.S. is a signatory, but the Senate has not ratified the Convention. The LOSC defines the rights and responsibilities of nations and their use of the planet's oceans. It establishes guidelines for

businesses, environment, and the management of marine natural resources.

Various developed nations with significant naval and maritime assets, the U.S. and U.K. for example, strongly support the Convention. Since entering into force in 1994, the LOSC has increasingly become an important part of the international legal order. Followed by the vast majority of the States of the world, the LOSC provides the only framework within international law for resolving contentious issues such as freedom of navigation, fishing rights, and the appropriate scope and boundaries of maritime zones.

A Constitution of the Sea

Constitutions, like that of the U.S. or other States of the world, are documents outlining rights and protections of a group as well as a particular mode of governance. The Convention was consciously written as a comprehensive articulation of the rights and responsibilities of States with respect to, among other things, navigation, exploitation of resources, and exploration of the world's oceans.
9 Additionally, the Convention covers governance over the sea and related disputes.10 From the beginning, States worked to achieve a "package" of mutually supporting agreements, rather than just a single treaty of limited scope. They sought to create a "comprehensive regime" dealing with all matters relating to the law of the sea.
11 LOSC was the embodiment of this desire and was to "establish true universality in the effort to achieve a 'just and equitable international economic order' governing ocean space."12

It has been noted that "[a]n examination of the character of the individual provisions reveals that [LOSC] represents not only the codification of customary norms, but also, and more significantly, the progressive development of international law…" This progression has a significant amount of weight, as the agreement was made by consensus of UN member States.13 That consensus led to a "grand compromise" that expanded the sovereign rights of coastal States over their territorial waters and exclusive economic zones, treated the deep seabed as a common heritage (and resource) of mankind, and codified the key principles of freedom of the seas.14

LOSC operates as a "Constitution of the Sea" by offering protections and regulating action. It governs, among other things, limits of national jurisdiction over ocean space, access to the seas, navigation, protection and preservation of the marine environment, exploitation of living resources and conservation, scientific research, sea-bed mining and other exploitation of non-living resources. It also covers dispute settlement, created international bodies to realize specific objectives, and fosters international cooperation to address maritime issues such as safety and environment. LOSC attempts to achieve an overall equitable order by balancing concomitant rights and benefits against duties and obligations.15

Many U.S. officials, including military leaders, have pushed for the U.S. to sign LOSC for reasons described in more detail in Chapter Eleven: State Sovereignty and the LOSC. Many U.S. Admirals and Generals have urged Congress to sign the LOSC so that the U.S. can take advantage of "the Treaty's 'navigational bill of rights' for worldwide access to get our troops to the fight, to sustain them during the fight, and to get them back home…."16

The Law of the Sea Convention as Customary International Law

The geopolitical challenges facing the law of the sea have not changed in their nature since the LOSC took effect in 1994. China is expanding its naval forces and creating man-made islands. Russia's last aircraft carrier recently operated in the Mediterranean, launching flights in support of the Assad regime in Syria. Somali pirates on tiny fishing boats still threaten shipping by the Horn of Africa. Japan claims a cultural right to whaling. Yemen uses missiles from Iran to attack U.S. vessels. Within this "equilibrium" the world continues to look to the law of the sea to keep the oceans safe and accessible.

Although the U.S. is not officially a party to the Convention, it is still obliged to follow the elements of the treaty that represent a codification of customary international law. The Convention represents customary international law because of the state practice and opinio juris on which LOSC was based. Most States are parties to LOSC and actively follow its precepts. Even before the Convention existed, many of the norms included in it were already practiced by States. States have done so out of a legal obligation, whether it be from recognizing Grotius's idea of the "free sea" or from the previous iterations of the LOSC. It should be noted, however, that a comprehensively articulated and written agreement on the law of the sea is necessary to hold a small number of influential States accountable for practices that they employ in limiting access or navigation that are incompatible with the U.S.'s global interests. See Chapter Four, Military Activities in an Exclusive Economic Zone, for more information on this topic.

The fact that LOSC is a multi-lateral treaty, accepted by most of the world, is evidence of the fact that the Convention is custom, backed by opinio juris. Not only do other States follow the Convention, but the U.S. does as well. The U.S. generally supported the terms of LOSC and only disagreed with Part XI, regarding the seabed. At the very least, under customary international law the U.S. will be required to comply with the terms of the Convention that it did not actively protest.

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