The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime

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Introduction

In November 1994 the LOS Convention came into legal force. Since the completion of the Treaty in 1982 and in some cases even before its finality, states have been adopting and applying many of the key concepts negotiated into the LOS Convention. For example, most states have enacted and enforced legislation respecting the exploitation of living resources out to the 200 nautical mile limit. Entry into force of the LOS Convention will have little effect on these widespread state actions. This is not to suggest, however, that the entry into force of the 1982 LOS Convention is without significance.

The states which have ratified the Treaty are now legally bound to implement and respect a highly detailed set of rules and practices regarding most ocean uses as set out in the 320 provisions and nine annexes of the LOS Convention. The Treaty regime is far more precise in its requirements and responsibilities on states.
than the vagaries and uncertainties of principles of customary international law.\textsuperscript{3} The states which are a party to the LOS Convention will also be directly involved in the establishment of several new international institutions, such as, the International Seabed Authority (ISA) and the Law of the Sea Tribunal.

One of the most technically sophisticated provisions in the LOS Convention is Article 76 which articulates the legal regime of the continental shelf. Article 76(1) recognizes that states have sovereign rights over the sea-bed adjacent to their territorial sea out to 200 nautical miles or to the outer edge of the continental margin. The technical complexity of Article 76 only becomes relevant where the geomorphologic continental margin extends beyond 200 nautical miles. The continental margin is composed of the physical (as opposed to juridical) continental shelf, the continental slope and the continental rise.\textsuperscript{4} Where the

\textsuperscript{3} The international legal system recognizes that treaties and customary law are co-equal sources of legal obligation for states. However, the process for the creation of customary law, an accumulation of consistent states practice combined with the subjective element that a state feels bound by the rule being followed, is very different from the process by which a treaty becomes legally binding on a state. See generally: Ian Brownlie, \textit{Principles of Public International Law}, 4th edn. (Oxford, Clarendon Press, 1990), pp. 4-15. The process for the creation of customary international law ensures that the resulting principles are general formulations as consistency of state practice at that level is easier to identify than at detailed levels.

In the context of the LOS Convention, it is posited that all or significant parts of the Treaty are reflective of customary international law. This is the frequently expressed US position regarding the LOS Convention. The convenience of this view is that the Treaty is legally binding irrespective of ratification. The United States, of course, excludes from its blanket assertion of customary law the deep sea-bed mining regime (see below). This overly broad view of the relationship between treaty and custom must be qualified, since very clearly some parts of the LOS Convention are conventional, meaning contractual (the institution-creating provisions), some parts are viewed by some but not all countries as conventional (passage rights in an international strait), and some provisions are expressive of customary law. Oscar Schachter, \textit{International Law in Theory and Practice} (Boston, Martinus Nijhoff, 1991), p. 283 comments on the above and creates another category for the provisions of the LOS Convention: “Still a fourth category is needed to include the provisions of the convention accepted as customary law in their general formulation... but which have significantly different legal rules on a more specific level. An example... are the various legal regimes for the exclusive economic zone as laid down by different coastal states. Thus a broad general principle accepted as customary law may generate a variety of special rules none of which may be general customary law but taken together they substantially alter the meaning of the general principle in practice.”


\textsuperscript{4} United Nations, Division for Ocean Affairs and the Law of the Sea, The Law of the Sea: Definition of the Continental Shelf (New York, UN Sales No. E.93.V.16, 1993), pp. 10–11 notes: “The continental shelf is that part of the sea-bed adjacent to the continent which forms a kind of large submerged terrace, the average surface of which generally dips gently seaward. The breadth of the shelf depends on the geological evolution of the adjacent continent. The continental shelf extends seaward to the continental slope, which is characterized by a marked increase in gradient. The foot of the continental slope, the junction with the continental rise, is identified on a typical margin by a marked decrease in slope. The continental rise is underlain by