Foreword

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Foreword

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The editors of the 1984 Law of the Sea Symposium asked that this Foreword concentrate on the future developments of the law of the sea. Implicit in the request is the assumption that the post-1984 period merits an examination of where the law of the sea is headed. The editors' assumption is a valid one. On the final date for signature, December 10, 1984, there were 159 signatures to the United Nations Convention on the Law of the Sea the Convention. This number alone justifies the exploration of what lies ahead in the new era of oceans law, ushered in by the wide acceptance of a comprehensive Convention.

Of course, the international law of the sea encompasses much more than the conventional law text that emerged from the lengthy negotiations at the Third United Nations Conference on the Law of the Sea the Conference, formally conducted from 1973-1982. What states do, as distinguished from what they agree to do, is still the essence of a main tenant of international law, state practice. Accordingly, a major part of the challenging task assigned by the editors of the symposium is to speculate on the future relationship between the Convention and state practice. A fundamental premise of this task is that the codification efforts of the Convention will have a far-reaching impact by providing written rules of international law to guide state action. A more refined issue is the extent of global uniformity that will evolve in the application of the individual articles of the Convention.

Broad generalizations are necessary to comment upon such large questions; thus, several overall observations are offered at the outset.

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The Convention is lengthy, complex, and fraught with ambiguity in areas that are highly technical. No single individual, however knowledgeable or experienced, can understand the Convention as a whole. In truth, there are many articles in the Convention that are not now, and never will be, fully understood. Language captures intentions only to a point; specific facts often cause unforeseen results. Thus, one prediction that is possible is that while sixty states will ratify the Convention, none of the parties will completely understand what they have agreed to uphold.

A second threshold issue is that state practice will continue to evolve, as it has in the past. That is, states will, by and large, attempt to abide by international law as they perceive it, but in practice, conventional rules will be frequently adapted (occasionally unreasonably) to fit the particularized needs and interests of individual states. Put another way, states will sign or become party to the Convention in great numbers, but will implement its provisions in quite different ways. States will tend to maximize their own interests and will be especially effective in this regard when acting against general international community interests.

The Convention was intended to provide a balance of competitive principles. Predictably, tensions will emerge between the constraints of the Convention and the unilateral demands of states. The most important future development of the law of the sea is that the 200 mile Exclusive Economic Zones will increasingly come under the unilateral sovereignty of coastal states. As distasteful as it may be to those with a more international outlook, the most valuable portions of the oceans have been partitioned and the division sanctioned by the vast majority of states in the world. Transit through international straits may become subordinate in the future to the issue of navigation through economic zones. Similarly, the International Seabed Authority will be ineffectual in restricting the flow of unilateral claims to continental margin areas believed by a coastal state to be valuable. Coastal states may claim the maximum seaward limits conceivably lawful under the Convention. Small island base points will be used by states to acquire jurisdiction over vast zones of former high seas proper.

Lastly, the Convention does not deal with all the law of the sea issues, and it lacks perspective in the treatment of certain areas that are covered. Many of the subjects reported in the recent developments section, for example Antarctica, the use of force at sea, and nuclear waste disposal were deliberately avoided by the delegates to the law of the sea negotiations. In contrast, part XI of the Convention and a number of related articles and annexes cover deep seabed mining in excruciating detail.

Shakespeare's adage of "much ado about nothing" comes to mind
with respect to the deep seabed. The value of offshore oil and gas reserves, as well as fisheries resources for the coastal states within the Convention-sanctioned archipelagic waters, 200 mile economic zones, and continental margins, totally eclipse the present or future value of the manganese nodule resources left, in part, for the international community in the areas beyond national jurisdiction. It is ironic that the "common heritage" areas that have highly significant economic potential were conceded to the coastal nations even before the Convention formally began in 1974. It is tragic that so much time, energy and talent were spent quarrelling over distracting deep seabed issues when there were so many important issues before the Conference that merited in-depth analysis and good faith negotiations. The neglect of these matters, as well as the avoidance of certain other topics at the Conference (such as Antarctica) will constitute much of the future state practice development in the law of the sea.

Turning to the Convention itself, the first two parts are directed primarily towards the limits of the territorial sea and the regime of innocent passage. Worldwide acceptance of a twelve mile territorial sea is already a fait accompli. However, disagreement will continue over what qualifies as a basepoint for measuring the breadth of the territorial sea, and, over the length of straight baselines. Whether there are any differences between the innocent passage regime in the 1958 Convention on the Territorial Sea and the Contiguous Zone and the regime in the new Convention remains to be seen. Confrontations may emerge over the issue of whether foreign warships must give notice or seek some type of authorization before entering another state's territorial sea. The Convention does not require notice or authorization; however, many states insist that this is necessary for warships moving into their territorial sea. Unfortunately, this division of international opinion existed both prior to and after the negotiations.

Part III of the Convention pertains to straits used for international navigation and the right of transit passage. Major powers, of course, can go through or over international straits via submarines or military aircraft with or without a Law of the Sea Convention. This has always been done and, realistically, strait states can show little harm from the practice. Nevertheless, one result of the negotiations will be that the principal maritime states will be more sensitive to the rights of strait states. Cooperation between straits users and littoral states is thus more likely because of the Convention.
A new regime for archipelagic states is provided in part IV. Bearing in mind that 200 mile zones begin beyond archipelagic baselines, one would surmise that eligible archipelagic states (many of which contain small islands with big zones) would be overjoyed with their gains from the Conference. Yet, neither Tonga nor Kiribat signed the Convention, reportedly because they felt that the stated archipelagic regime did not go far enough. Most of the archipelagic negotiations at the Conference occurred between the United States and a handful of key nations such as Fiji, Indonesia, and the Bahamas. The predominant concern of the United States was navigation and overflight, while the archipelagic states were primarily interested in resource gains and territorial integrity. Once their mutual compatibility was realized, the informal negotiations began the highly technical task of developing geographical criteria to determine which nations would qualify as archipelagic states, and which nations would not. Despite the historical lack of international acceptance of the archipelagic concept, there are unlikely to be significant archipelagic problems in future state practice. This is not to say that no delimitation or resource access issues will arise, but merely that these issues are not related *per se* to the international acceptance of the archipelagic concept.

The Exclusive Economic Zone concepts, embodied in part V of the Convention, are easily the most significant contribution to the law of the sea since the regime of the high seas gained global dominance over 500 years ago. The Zones are so entrenched in state practice that, while President Reagan rejected the Convention, he nonetheless declared on March 10, 1983, that the United States would claim an Exclusive Economic Zone. During the negotiations, the Zone emerged as a compromise between major maritime powers, such as the United States and the 200 mile territorialists such as Ecuador and Peru. It is ironic that the United States, Ecuador and Peru were not signatories to the Convention. With the most extensive 200 mile zone of any nation in the world, the United States appears to have made large, immediate gains from the wide acceptance of the Exclusive Economic Zone concept. However, future trends appear to favor the views of nations such as Ecuador and Peru, as states slowly, but inextricably extend their coastal sovereignty out to the 200 mile limit.

If there is one prediction that is almost certain, it is that numerous future problems in the implementation of the Exclusive Economic Zones will arise. One need only note that the International Court of Justice has been preoccupied for the past fifteen years with delimitation problems in the oceans to realize that conflict is inevitable. The pattern is unlikely to change. Similarly, fishery disputes will continue to evoke confrontations, although with each passing year greater
control is evolving in coastal states. May distant water fishery nations insist that coastal states provide access to "surplus" stocks local fishermen cannot catch? Will the United States join the rest of the world in accepting the right of the coastal states to manage all fish, including tuna, inside their 200 mile Exclusive Economic Zones? These and innumerable other questions will surround the implementation of part V of the Convention.

The Continental Shelf regime is contained in part VI of the Convention. It may be a surprise to some readers to learn that the Continental Shelf regime co-exists with the Exclusive Economic Zone in many instances. In other states, the Continental Shelf regime continues beyond the 200 mile limit, in situations where the continental margin, as defined in article 76, extends that far seaward.

The concept of the Continental Shelf is accepted in customary as well as conventional international law. Nevertheless, important issues, such as the delimitation of the continental shelf between coastal states, the fixing of the outer continental margin limit between coastal states, and the international regime remain unresolved. It will be interesting to note how faithfully states will make payments and contributions for the exploitation of the Continental Shelf beyond the 200 mile limit, as is provided in the Convention.

For centuries, the traditional regime of the high seas began three miles offshore. With the ambiguous status of the high seas regime in the 200 mile Exclusive Economic Zones, the thirty articles in section 1 of part VII received relatively little attention at the Conference. In the future, however, more confrontations between states over part VII than part XI are likely to occur. Although the high seas articles are largely taken from the Convention on the High Seas, which is accepted as in accord with customary international law, issues such as the nationality of ships, the immunity of warships, illicit drug traffic, and hot pursuit are likely to generate recurring and, in some cases, extremely serious conflicts between states.

Section 2 of part VII contains five articles on high seas fisheries. Most of these matters are already covered in detail by international fishery agreements. Accordingly, this particular section is likely to receive only minimal attention in the future.

Parts VIII, IX and X, respectively, pertain to islands, semi-enclosed seas and landlocked states. It is unlikely that these Convention articles will generate much practical attention. The wording in the text is typically too ambiguous to permit forceful implementation. In any event, the importance of these topics will be factually
dependent upon the actions and attitudes of the states directly concerned.

Articles 133 through 191 of the Convention are devoted to the International Seabed area. Too much has already been said and written about this subject to warrant further comment in this Foreword. Despite the perceived symbolic importance of the negotiations about deep seabed mining, at least in the intermediate term, the practical importance of the deep seabed is very slight. If minerals or resources of value are discovered — and this is quite possible — a new, less cumbersome, regime is likely to be negotiated. In the meantime, it appears unlikely that either a “mini-state treaty” or International Seabed Authority commercial mining will occur in the next decade.

Part XII of the Convention’s stated purpose is the protection and preservation of the marine environment. However, the articles neither protect nor preserve in any realistic sense. At best, they can be seen as embodying broad generalizations with which few can disagree. Perhaps a foundation has been laid in part XII for future developments to better the international marine environment; however, even this is doubtful, as this part of the Convention lacks any method of meaningful enforcement.

Marine scientific research is the subject of part XIII of the Convention. Scientists and the institutions they represent seldom can afford a confrontation with a coastal state. Moreover, unless some type of illicit activity is involved, governments, in general, are far less likely to stand up for the rights of scientists than they are to protect the rights of commercial fishermen and petroleum drillships. Future developments in marine scientific research are likely to go one way — more duties imposed upon the scientists, more rights granted to the coastal states.

Part XIV attempts to deal with transfers of marine technology. An industry spokesman attending the Conference negotiations once suggested that the United States Department of State could transfer all the technology it had, but his company would be paid for its research and development efforts. Thus, the amount of future implementation activity under part XIV is likely to be limited.

The peaceful settlement of disputes portion of the Convention is contained in part XV. This part of the Convention could have a major influence on the future development of the law of the sea. It could also be ignored.

Sovereign states are reluctant to risk submitting important matters to international adjudication; and of course, unimportant issues remain unimportant. Still, there is much clarity and ingenuity in the part XV articles that may entice states to resort to the sophisticated array of settlement procedures offered by the Convention. Unques-
tionably, this part will be considered a significant contribution to the field of international law in its own right, regardless of the extent to which it is actually used.

The remaining parts of the Convention, XVI and XVII, pertain to general provisions and final clauses. These parts, the nine annexes and the Final Act, are unlikely to receive much attention in the future, except from law of the sea scholars.

Quite obviously, any summary of the direction in which the law of the sea is headed in state practice, in light of the wide acceptance of the Convention, will be inherently inadequate. Broad generalizations are necessary for such a summary, but they are of only limited value. The post-1984 period will be interesting if for no other reason, because states will be forced to implement and respect the text of the Law of the Sea Convention. The traditional conflicts over the use of common ocean spaces will certainly continue. The character of these confrontations, however, will be significantly changed, as coastal states now have the upper hand over the most valuable resource areas. Major powers will continue to act in accord with their best interests in the ocean; prudent coastal states will look the other way, or, at least, not look too hard for problems they cannot resolve.

The post-1984 period will be one of adjustment, rather than radical change for the law of the sea. Optimistic prophecies to the effect that the Convention will bring order and peace to the oceans will, in all likelihood, not be realized. States, like the humans that control them, still have a surplus of greed and a shortage of international good will.

Notwithstanding this gloomy prediction, the negotiations are a hallmark in international law, both conventionally and in state practice. Perhaps the only reliable prediction about the future law of the sea is this: much that is now expected will not occur and, much that is not now anticipated will.