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Impact of UNCLOS III on U. S. Naval Operations

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ABSTRACT

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Recent announcements from the new federal administration have been touted as the harbinger of doom for the Law of the Sea Conference. Actually, the Administration may be following a blueprint developed three years ago.

This paper briefly summarizes the development of the Third United Nations Law of the Sea Conference (UNCLOS III) and the influence that national security had on its development. The missions of the navy as promulgated by Chief of Naval Operations, Admiral Elmo Zumwalt are: Strategic Deterrence; Sea Control; Projection of Force Ashore; and Naval Presence. The effect of the Draft Convention, Informal Text (DCIT) provisions in five areas are discussed. These areas are: Transit of International Straits; Archipelagos; the Territorial Sea; the Exclusive Economic Zone; and the Deep Seabed.

The result of the study is an assessment that there are no seriously adverse impacts on U.S. naval operations in the DCIT. The sovereign rights of warships are well preserved as is their flexibility and their area of operations is not harmfully effected. The Informal Text provides the minimum level of order sought by national defense interests in a regime which protects traditional freedoms of the high seas and improves upon the former rule of "innocent passage".

There are national interests in the Law of the Sea in addition to those of the U.S. Navy. The deep seabed mining interests do not consider the present text acceptable and several LOS authorities have disputed the concept of a "package deal" where some interests must be sacrificed for the sake of others considered more important. It is possible to obtain a treaty which is wholly acceptable and the United States should continue negotiations on UNCLOS III toward such an end.

The New York Times of March 5, 1981 heralded a substantial shift in U.S. government policy under the Reagan administration toward the Third United Nations Conference on the Law of the Sea, when it disclosed that the United States did not intend to complete negotiations at the impending meeting in New York, but wanted time to review the entire treaty.[1] On the following day, State Department spokesman George Taft was quoted in the paper as unequivocably stating that the United States would not become a party to the treaty if it did not provide guaranteed access to the seabeds for U.S. mining interests.[2] Further definition of administration plans was reflected in the March 9, 1981 edition of the New York Times. In an action termed "a second Saturday night massacre" by former LOS Ambassador Elliott Richardson, the administration replaced acting head of delegation George H. Aldrich and six top civil servants on the delegation, and named James L. Malone as the new head of delegation. The new delegation will include some widely respected experts on UNCLOS III, including Bernard H. Oxman and Thomas A. Clingan. Lee Ratiner, the former senior negotiator for the Ford administration will also be on the delegation. The reason given for the abrupt delegation members' dismissal was to establish a "clean break"

[1]Bernard D. Nossiter, "Reagan's Delay on Sea Pact a Source of Dismay at U.N.", New York Times, 5 March 1981, p. A4.

[2]"U.S. Wants Sea Treaty to Give Access to Minerals", New York Times, 6 March 1981, p. A5.

with the policy of the previous administration, which had planned conclusion of the treaty at the New York session which started on April 10. The previous week an administration spokesman cited "serious problems" with the current text (DCIT) in the areas of share allocation of seabed mineral resources as well as the requirement for technology transfer by private companies.[3]

Clearly, a radical shift in United States policy toward the Third United Nations Conference on the Law of the Sea (UNCLOS III) has occurred. The purpose of this paper is to examine the effects that UNCLOS III would have on United States naval operations as well as to consider the implications of a "no treaty" outcome on the navy. Are the predictions of gloom, doom, and Armageddon coming from some circles justified, and if not, why? Whether or not this treaty becomes international law, it has had and will continue to have significant impact on international law and on the performance of several missions of the navy.

The theme of this study will be developed by first outlining the missions of the U.S. Navy. A brief review of the development of UNCLOS III will be made, including the influence of national security interests and also the Navy Department on national policy development. Treaty issues from the Draft Convention (Informal Text) (DCIT) which are relevant to the Navy will be delineated, along with their

[3]Bernard Gwertzman, "President Replaces Top U.S. Diplomats at Law of Sea Talks", New York Times, 9 March 1981, sec A., p. 1, A14.

expected influence on naval operations in the context of mission performance. Since acceptance of UNCLOS III at this juncture is far from certain, it is appropriate to project the kind of a world the Navy will operate in without a comprehensive treaty, or with one not accepted universally. A conclusion completes the treatment of this topic.

MISSIONS OF THE NAVY

Chief of Naval Operations, Admiral Elmo R. Zumwalt, in 1970, established four general mission areas for the Navy. These areas are: Strategic Deterrence, Sea Control, Projection of Power Ashore and Naval Presence. What are these missions and how do they equate to operations?

The strategic deterrence mission has three objectives: To deter all-out attack on the U.S. or her allies. The Navy's fleet of nuclear ballistic missile submarines (SSBN's) carries out the strategic deterrence mission. This fleet is comprised of 41 Polaris/Poseidon submarines, whose ballistic missiles can be launched at a range of 2500 miles from a target. Ten Trident class SSBN's have been authorized for construction which will have a missile range in excess of 4500 miles.[4] Stealth and concealment of these ballistic missile platforms is critical to the success of their mission. They must be able to travel anywhere on the high seas without impediment or detection to assure their availability to respond to an enemy's attack on the United States or her allies. Their freedom of navigation is perhaps the first item in any oceans policy that must be protected.[5]

[4]Mark W. Janis, Sea Power and the Law of the Sea, Studies in Marine Affairs (Lexington, Mass: Lexington Books, D.C. Heath and Co., 1976), p. 2, 3.

[5]Max K. Morris, "The Naval Role in An Integrated Oceans Policy", The Oceans and U.S. Foreign Policy, Center for Oceans Law and Policy, University of Virginia, Oceans Policy Study series, no. 1:4 (Charlottesville: The Mitchie Co., 1979), p. 74.

The second mission of the Navy is sea control. Historically, the term "control of the sea" was used by Mahan to include denial of the use of the sea to the enemy and assertion of one's own use. Today, with the advent of submarines and aircraft, complete denial is no longer feasible, and instead, the objective is to permit one's use and deny the enemy's use of the same sea area when necessary. The national objectives which support the sea control mission include: To ensure use of the sea lanes; to gain or provide supplies; and to provide safety to naval forces. This could be thought of as the "traditional" role of the Navy - to engage the enemy and defeat him at sea. As encompassing as this objective is, so are the forces required to support it: attack submarines; aircraft carriers with their anti-submarine; attack and fighter aircraft; escort ships; and supporting logistic ships are all integral to the sea control mission. The performance of this mission requires unfettered transit on the high seas. Ideally, from the Navy's point of view, territorial seas should be as narrow as possible to maximize the flexibility of the naval forces involved. Actual performance of this mission would occur during wartime. Examples include the resupply of Europe with goods, troops and munitions; amphibious force protection in transit; and protection of carrier battle groups during operations.

The third mission of the Navy is projection of power

ashore. There are three categories of projection of power ashore: Amphibious assault, naval bombardment and tactical air. Amphibious assaults are conducted as a combined Navy/ Marine Corps effort to land troops in hostile territory. Naval gunfire bombardment is used in direct support of troop landings or operations ashore. Tactical air projection ashore can be used to destroy the enemy's warmaking potential or to support ground forces and maintain control of the airspace in the vicinity. A variety of forces support this mission, including amphibious ships, aircraft carriers, cruisers, destroyers, submarines and supply ships. The rescueing of civilians from civil war, as occurred in Lebanon in 1958, is a corollary to this mission. As seen in the Lebanon example, a hostile warfare environment is not necessary for performance of parts of this mission, although in the normal context projection of power would occur in a state of war. The missions of sea control and projection of power may seem virtually the same. The distinction most clearly lies in the objective of the action: whether to secure/deny control of the seas or to support a land campaign.

The naval presence mission is simply the diplomatic use of naval forces in scenarios short of war. It includes the use of forces to deter actions contrary to U.S. interests or to encourage actions in the U.S. interest. These forces may be showing a presence to avert a crisis or re-

sponding to a crisis situation. The forces available to perform this mission include all those mentioned previously with the probable exception of submarines. A naval presence force can threaten amphibious assault, air attack, bombardment, blockade or reconnaissance to a particular area. It can act to support an existing regime under stress, threatened from within or beyond its borders. Alternatively, a naval presence force could exhibit U.S. support for a coup d'etat of an unfriendly government, simultaneously encouraging calmness in that state and discouraging interference by other nations. The mixture of forces to be used depends upon the type of threat to be exerted as well as the perceptions of those whom the action is meant to influence. The naval presence mission as a political or diplomatic tool is used in situations short of war and the ideal objective is to avoid war through the use of properly applied influence. In order to perform this mission, a naval force would be required to operate in the vicinity of the objective area, and the presence must, of course, be recognized.

The missions enumerated here are based upon policy of the Chief of Naval Operations and the Department of Defense.[6] In Oceans Policy Study 1:4 of April 1978 retired Rear Admiral Max K. Morris used different descriptions. He lists

[6]Stansfield Turner, "Missions of the U.S. Navy", Naval War College Review, March-April 1974, pp. 2-17.

naval roles as: national self defense; assistance to major allies; and protection of vital resource lines and areas.[7] Admiral James L. Holloway III, who was Admiral Zumwalt's successor as Chief of Naval Operations, defined two basic functions: sea control and power projection; and set forth four specific missions as facets of power projection. These include: Nuclear deterrence; Amphibious projection; Conventional (shore bombardment, blockade) projection; and Presence.[8] These and other dissections of the missions or roles of the Navy may vary the emphasis in a particular area, but can still be easily seen to mesh with the mission statements enumerated previously. The forces required for their performance, from nuclear ballistic missile submarines to aircraft carriers and general purpose forces, remain the same.

[7]Morris, p. 74.

[8]Geoffrey Kemp and Harlan K. Ullman, "Towards a New Order of U.S. Maritime Policy", Naval War College Review, Summer 1977, p. 102-3.

LAW OF THE SEA DEVELOPMENT

As a subset of international law, the Law of the Sea has generally developed through a combination of treaty and custom. The Third United Nations Conference on Law of the Sea (UNCLOS III) is the most comprehensive attempt ever undertaken to codify all of the rights and responsibilities of states in the many resource and non-resource uses of the world's oceans. Quantum increases in pollution levels in the oceans in recent years as well as the loss of fishing grounds from over-exploitation have refuted the once popular belief in the infinite capacity of the world's oceans. Recognition of immense stores of mineral wealth on the sea floor in tandem with the concept that this resource is the "common heritage" of mankind and the aggressive demand of newly emerging states for a fair share of that wealth mandated the establishment of some set of rules to regulate the exploitation and distribution to all nations. A 1945 proclamation by President Truman declared that the United States regarded the natural resources of the sea-bed and subsoil of the contiguous continental shelf to be subject to U.S. jurisdiction and control while maintaining that the water column above was still considered as high seas.[9] Over the next twenty years a trend of increasing coastal state control developed with several South American

[9]Gehard Von Glahn, Law Among Nations (New York: Macmillan, 1976), p. 317

states, (Chile, Equador and Peru) going so far as to declare unilaterally a 200 mile territorial sea in 1952.[10] Customary law in the past could be virtually decreed by the major seapower and by the adquiescence of other nations, these decrees would become accepted as law; today such arbitrary methods seem hardly practical.

The first attempt in this century at codification of the law of the sea took place at the Hague Conference of 1930. The discussion centered on the width of territorial waters and no agreement was reached due to Britain's refusal to recognize contiguous zones as legal.[11] The next codification attempt was at the 1958 United Nations Conference on the Law of the Sea. This conference drafted four conventions which are now in force. They are: (1) The Convention on the Territorial Sea and Contiguous Zone; (2) The Convention on the High Seas; (3) The Convention on the Continental Shelf; and (4) The Convention on Fishing and Conservation of the Living Resources of the High Seas. In order to achieve the consensus required for ratification of these Conventions, many controversial topics were left purposely vague. For example, the breadth of the territorial sea was no where specified and the breadth of the contiguous

[10] Kenneth Booth, "Military Implications in the Changing Law of the Sea", in Law of the Sea: Neglected Issues, ed: John King Gamble, Jr. (n.p., University of Hawaii, 1979), p. 344.

[11] Ibid.

zone was likewise undefined.

In August 1967 Malta's United Nations Representative, Arvid Pardo, requested the inclusion of this item in the General Assembly's 22nd Session:

> "Declaration and treaty concerning the exclusively for peaceful purposes of the seabed of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."[12]

The Third United Nations Conference was the eventual outgrowth of Ambassador Pardo's statement. Even before, there was a growing concern in the United States about ocean development and about international control of ocean resources as seen in the results of: (1) the Committee on Natural Resources Conservation and Development formed by President Johnson in 1964; (2) the Commission to Study the Organization of Peace session of 1966; and (3) the first annual meeting of the Law of the Sea Institute at the University of Rhode Island in June of 1966. The Maltese declaration, then, was more the statement of an evolving concept than a radical departure from precedent.[13]

UNCLOS III, after a preliminary meeting in New York, convened its first substantive session in Caracas, Venezuela in June 1974. The Conference was organized into

[12]Shigeru Oda, The Law of the Sea in our Time, vol 1: New Developments, 1966-1975 (Leyden: A.W. Sijthoff, 1977), p. 16.

[13]Ibid, pp. 3-5.

three main committees. The First Committee was concerned with the regime of the deep seabed including the methods, conditions and economic implications of exploration and exploitation and development of actual methods for the same. The Second Committee dealt with general issues, mainly zones of national jurisdiction, including the territorial sea and contiguous zone, international straits, the exclusive economic zone beyond the territorial sea, the continental shelf, high seas, archipelagos and islands, enclosed or semi-enclosed seas and the rights of land-locked states. As can be seen, these second committee topics include all four Conventions produced by the 1958 U.N. Conference on the Law of the Sea, plus several new and complex issues. The Third Committee considered the areas of the marine environment (pollution), scientific research and the transfer of technology.[14]

At the second session in Geneva in 1975 the chairman of each main committee was requested by Conference Chairman Ambassador Shirley Amerasinghe of Sri Lanka to prepare a "single negotiating text" (SNT).[15] Resultant were three draft conventions revised and negotiated in later sessions. The present product of the UNCLOS III effort is the Draft

[14]Ibid, p. 155-157.

[15]Robert B. Krueger, "Where Are We on the Law of the Sea?" in The Law of the Sea: Issues in Ocean Resource Management, ed: Don Walsh (New York: Praeger Publishers, 1977), p. 79.

Convention on the Law of the Sea (Informal Text), or DCIT, produced by the ninth session at Geneva in July/August 1980.

The concept behind an all-encompassing treaty such as this is that it is a "package deal" which must be accepted or rejected as a whole. In other words, any particular state may find some parts of the convention not in its ideal best interest, with other parts strongly in its favor and ratification must be decided upon the summation of all positive and negative aspects. In simpler terms, in an acceptable treaty, the gains must outweigh the losses for any specific state.

U.S. POLICY DEVELOPMENT AND NATIONAL SECURITY INTERESTS

It was 1970 before the U.S. federal government began to publicly announce its intentions and positions on Law of the Sea issues. On February 2, 1970, President Nixon, in a foreign policy report to Congress, stated that "the most pressing issue regarding the law of the sea is the need to achieve agreement on the breadth of the territorial sea, to head off the threat of esculating national claims over the oceans."[16] Previously, on July 30, 1969, the Assistant Secretary of Defense for International Security Affairs stated at a Senate subcommittee hearing that "the Defense Department considered it important for national security to define a narrow boundary of the continental shelf and that the eventual legal regime of the seabed should have no effect on the traditional freedom of the seas."[17]

On the same day, in a speech in Philadelphia, John R. Stevenson, the State Department legal advisor and later chief negotiator, disclosed that the United States had been conferring on ocean law matters with other nations over the previous two years. He indicated in his remarks that the United States was prepared to recognize a 12 mile territorial sea, provided that freedom of transit through inter-

[16] Oda, p. 120.

[17] Ibid, p. 95.

national straits and preferential fishing rights for coastal states could also be accepted.[18]

No mention of a seabed regime was made until President Nixon's Ocean Policy Statement of May 23, 1970. In retrospect, the President's statement might be considered an opportunity missed by the international community. The president proposed that all national claims beyond the 200 meter isobath be rescinded and that resources beyond that point be regarded as mankind's common heritage with royalties to be paid to an international body for mineral exploitation. Seaward of this isobath would be a trusteeship area, managed by the coastal state and the deep seabed would be an area under the regulation of an international authority, which would license exploitation and collect fees.[19] The DCIT seabed regime bears little resemblance to that proposed by the U.S. in 1970.

National security interests and the Navy in particular, played a major role in development of U.S. policy on the law of the sea. The first public statements in 1970 and the congressional hearing referred to in 1969 both espoused maximum freedom of the seas as a prerequisite position which could not be compromised. A clear pattern of "creeping jurisdiction" had continued since the 1958 Convention.

[18] Ibid.

[19] Ibid., pp. 96-97.

RELEVANT ISSUES AND THEIR IMPACT ON NAVAL OPERATIONS

Mark Janis in Sea Power and the Law of the Sea identifies three major LOS issues of concern to U.S. naval operations, including: passage through straits; transit along coasts; and military uses of the deep seabed. Since publication of that book the military use of the seabed has been relegated to a lesser status in view of a general consensus in agreement with the United States position, and other areas have become more prominent. Five issues will be discussed in this paper as well as the relevance of each to the accomplishment of stated naval missions. These issues are: paggage through international straits; archipelagic passage; transit through territorial seas; the exclusive economic zone; and the deep seabed.

Maximum freedom of operations within a framework of minimal international order is the optimum UNCLOS III outcome from the U.S. Navy's point of view. Any influence or regulation of the Navy's ability to conduct operations could be perceived as a loss of sovereign power.

STRAITS PASSAGE

Passage through international straits is a fundamental prerequisite in the maintainence of freedom of the high seas. Closure of international straits would either hamper or negate access between high seas regions. The United States today officially recognizes a three mile territorial sea, a distance which was supported as customary law by Great Britain and the U.S. when specific boundaries of territorial seas could not be agreed upon at the '58 conference. The alarming increase in states claiming territorial seas of 12 miles or more has already been pointed out. During the period between the conferences the U.S. tacitly acquiesced to these unilateral claims and by her support of the 12 mile sea in at UNCLOS III gives at least implicit recognition of them. This inevitable expansion of the territorial sea boundaries would enclose 116 of the world's 125 international straits. The '58 Convention on the Territorial Sea and Contiguous Zone, in Article 16, provides the rule of "innocent passage" for international straits. Under this treaty, submarines must navigate on the surface and show their flag. All ships enjoy this right of innocent passage unless it is "prejudicial to the peace, good order or security of the coastal state." The coastal state is proscribed from hampering innocent passage but it is permitted "to prevent passage...which is not innocent." Thus, there remains the possibility that a subjective

judgment on the part of a coastal state could close a strait to U.S. warships. Although this has not happened to day, the increasing authority of coastal states (i.e. "creeping jurisdiction") increases the likelihood of a confrontation in the future.

A new descriptive term of the right of straits passage has been sponsored by the U.S. and adopted by UNCLOS III. The DCIT in Art. 38 provides for the right of "transit passage" through international straits. States bordering such straits are precluded from denying, hampering or suspending this right. Transit passage differs from innocent passage in two significant ways: The right is extended to aircraft, and there is no requirement for submarines to surface. The transiting ships are required by Art. 39 to proceed without delay and avoid any threatening actions or any action not normal to a transit.

The new treaty thus provides more affirmatively the right of naval ships, submarines and aircraft to navigate through international straits without encumbrance. To gain this "minimal order", the U.S. would recognize the 12 mile territorial sea, which would probably be recognized as customary law from its widespread application. The concealed passage of our strategic SSBN force has gained acceptance and authorization in DCIT. This right of submerged transit was probably the most important objective of national security interests.

At that time 54 percent of coastal states claimed a territorial sea boundary of three miles or less, and 18 percent claimed 12 or more miles. By 1968 only 35 percent still claimed three miles and extensions to 12 miles or more had reached 43 percent.[20] These unilateral extensions of sovereign jurisdiction alarmed not only the United States, but other traditional sea powers as well. Both France and Great Britain support the retainment of traditional navigation rights and freedom of the high seas.[21] Not surprisingly, in view of her relatively recent arrival as a prime seapower in the world, the Soviet Union also supports the concept of maximum freedom to navigate around the world. About 30 states now advocate territorial sea limits between 12 and 200 miles. Were 200 mile territorial seas to become accepted, the U.S.S.R. would have ocean access only from its northern Siberian routes and it would have no access to the Atlantic Ocean.[22] In short, the Soviet Union has even more to lose than the United States and other traditional maritime nations from the process of creeping jurisdiction.

[20] Ibid.

[21] Janis, p. 42, 55.

[22] Mark W. Janis, "The Abashed Conservative: in Soviet Oceans Development, National Oceans Policy Study (Washington: Government Printing Office, 1976), p. 289.

ARCHIPELAGIC PASSAGE

At the '58 Conference, Indonesia and the Philippines were unsuccessful in their attempt to achieve recognition of a system of strait baselines connecting outermost islands and enclosing internal seas. The effect of such a rule, known as the Archipelagic Rule, is dependent upon the size of the area enclosed and whether the islands or archilelagos are compact or widely dispersed in their distribution. The chief objections to this concept came from the United States and the United Kingdom but both nations appear willing to accept it in the DCIT. Both nations claim over eight thousand miles of baselines, enclosing areas of over six hundred sixty thousand square miles of internal waters in the case of Indonesia and almost one hundred fifty thousand square miles in the case of the Philippines.[23]

Three factors appear to have influenced the change in United States position on this Archipelagic Rule. First, and most obviously is the provision of assurance for ship and aircraft transit rights through state-designated routes. Second, and probably as important, is the need to appease Indonesia, a state which controls straits vital to national security interests. Third is the continued pressure to recognize the special characteristics of archipelagic states and their right to control the waters among the

[23]J.R.V. Prescott, The Political Geography of the Oceans (New York: John Wiley and Sons, 1975) pp. 104-106.

islands for security and economic exploitation.

The DCIT recognizes archipelagic states and their right to enclose their waters with baselines up to 125 miles in length and consequently has developed a right of archipelagic passage, which is an innocent passage right through state-designated sea lanes and air routes. The duties of transiting vessels and coastal states rights and duties are identical to those for transit passage through international straits.

The net effect of the archipelago rule is to increase substancially the internal waters of the archipelagic state, thus reducing the high seas area in the vicinity. Naval ships would be restricted from these internal waters except to transit through designated sea lanes, in which case they must remain within twenty-five miles of the sea lane and conform to the duties of ships in transit. In brief, they must proceed without delay, refrain from any threat or use of force and refrain from any activities other than those incident to normal transit. So, in addition to loss of area in which to operate, naval ships are restricted from tactical maneuvers, flight operations and any other actions not involved with a continuous and expeditious transit. Despite these limitations, the most important interests to the U.S. Navy are protected in the DCIT. Submerged transit by submarines and ship and aircraft transit are all permitted. With a loss of flexibility in operating areas has come the

lawful guarantee of transit rights, except when suspended on a non-discriminatory basis for security reasons.

TERRITORIAL SEAS

The regime of innocent passage applies to all ships traversing territorial waters as it did in the '58 Convention. The meaning of innocent passage is more well-defined under UNCLOS III. Article 19 precludes: the exercising of weapons; collection of information; any launching or landing of aircraft or military devices; and any other activity not directly bearing on the passage. Upon first perusal, this might appear a severe restriction on naval ships. Consider, however, that this territorial sea is now limited by sanction of the treaty to a width not greater than 12 miles. Beyond that, the rules of the high seas apply and there is therefore no adverse consequence. The '58 Convention by its lack of definition of the breadth of the territorial sea and vague definition of innocent passage could be argued to not even provide the minimum order sought. The naval presence mission could be argued as having been obviated, but a distance of nine miles makes little real difference to this role.[24] The political use of a naval force in the naval presence mission is designed to influence national governments. Its effectiveness is not lessened because it can't be seen from the shore line. Its visibility is far more important politically than optically.

[24]Lawrence Juda, Ocean Space Rights, Developing U.S. Policy, Praeger Special Studies in International Politics and Government, (New York: Praeger Publishers, 1975), p. 47.

Another article of the innocent passage section of DCIT could be far more detrimental to a naval operations in territorial waters. Article 23 requires foreign nuclear powered ships and ships with nuclear substances aboard to carry documents and observe international agreements. The coastal state has the right under Article 25 to "take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters...is subject." This raises the possibility of a coastal state attempting to interrupt the innocent passage of warships to inspect the aforementioned documents. The capability of U.S. ships to launch nuclear weapons is unclassified and widely recognized. The fact of what specific ships are carrying nuclear weapons and how many they have aboard is both classified and closely guarded. Two difficulties arise from such a scenario. The first is the classified nature of the actual weapons aboard and the other is the infringement upon sovereign rights in the detaining or interruption of innocent passage of a U.S. warship. It is unlikely that the U.S. government would permit any such infringement upon sovereign power. Redress of this infringement on sovereignty is implied in Article 32, which states that "nothing in this convention affects the immunities of warships"...Unfortunately, exceptions to this immunity include the restrictive Article 23 as well as Article 30, which permits expulsion from the territorial sea by a coastal state of any war-

ship not in compliance with its laws and regulations on passage.

Relief from these onerons restrictions doesn't arrive until Article 236, contained in Section 10 of Part XII of the DCIT "Protection and Preservation of the Marine Environment." This article on Sovereign Immunity states:

> "The provisions of this Convention regarding the protection and preservation of the marine environment do no apply to any warship, naval auxilary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each state shall ensure by the adoption of appropriate measures...that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention."

So here is the rescue from inspection, regulation or other foreign interference with United States naval vessels and aircraft. U.S. units are expressly exempted and in return for such consideration, they must attempt compliance when possible with local rules and regulations on pollution.

THE EXCLUSIVE ECONOMIC ZONE

This zone is a recognition of the rights of coastal states to exploit the natural resources of an area beyond the territorial sea with a nominal breadth of 200 miles from the coast. The coastal state is given jurisdiction over, inter alia, marine scientific research and the protection of the marine environment. While scientific research is not normally a primary role for naval vessels, the taking of depth/temperature data with bathythermographs is a routine evolution used to verify local water conditions to optimize employment of Anti-Submarine Warfare (ASW) sensors. Any attempt to regulate such a normal activity would adversely impact on a ship's anti-submarine warfare capability. Gunnery practice and carrier air operations are not specifically regulated, nor are they explicitly permitted. It could, therefore, be conceivable for a coastal state to prohibit such actions as harmful to the environment. These gray areas in the DCIT could have serious potential consequences, but again Article 236 grants warships and aircraft immunity from environmental restrictions.

Article 58 of the DCIT specifically invokes the high seas freedoms of Article 87 for the Exclusive Economic Zone. The jurisdictional immunity of warships from any but the flag state (Article 95) also applies because it is compatible with Part V (The Exclusive Economic Zone). Any coastal state regulation of naval vessels with respect to pollution

control is denied by Article 236.

The resultant of Part V is an area of complete coastal state control over resources; some control over shipping (i.e. pollution regulations permitted by Article 56); but no permitted regulation of warships, including submarines. Naval operations are much benefited by the concept of an EEZ, since it is the negotiated solution to the growing concern over increased areas of sovereign jurisdiction by coastal states. Captain John R. Brock, a U.S. Navy lawyer, perceived the problem and the needed solution over ten years ago:

> The "creeping encroachments on the high seas by exaggerated unilateral claims of nations can and should be mitigated through treaties and agreements which...preserve the high seas rights of all nations for the traditional, unimpeded use of these ocean highways for maritime traffic."[25]

[25]John R. Brock, "Threats to Freedom of Navigation", The JAG Journal 24 (December 1969-January 1970): 357.

THE DEEP SEABED

With the development of the SSBN fleet in the early 1960's came ideas for military uses of the sea bed such as underwater missile silos, submerged submarine bases and mobile sea-floor missile systems. Although technologically feasible, the cost of such systems could aptly be described as enormous. Additionally, there developed strong influences on the international plane that the sea bed should not be used for military purpose and that such action was not in the common interests of mankind. In the late sixties, it was realized in the Department of Defense that such strategic weapon systems and submerged submarine bases would not be practical.[26] The Seabed Arms Control Treaty of 1971 prohibits the emplacement of nuclear and other weapons of mass destruction on the ocean floor. Moored mines and listening devices are not controlled by the treaty due to the refusal of major maritime powers to submit to such regulation. In the negotiations for UNCLOS III there have been some attempts to include regulations on military uses of the sea bed, but these were successfully resisted by the United States as the proper subject of another treaty (SACT).

It is widely known that the United States (and to at least some extent, the Soviet Union), makes use of coastal based stations for tracking foreign submarines in the oceans.

[26]Juda, p. 87.

The interests of the Navy and the U.S. government would be best served if international-body authority over the deep seabed is limited strictly to the exploration for and exploitation of mineral resources. This objective is largely achieved, since Article 157 limits the Authority's power to those functions expressly permitted in the DCIT. Despite four articles referring to the peaceful uses of the sea/seabed (Art. 88, 141, 147, 301), there is no specific exclusion of the use of these listening devices. Considering the strategic importance of these stations and their relation to nuclear deterrence, an argument could be made in support of their peaceful purpose. As appraised by Rao:

> "Despite the rhetoric employed and a certain consistency exhibited in proposing that the oceans be used exclusively for 'peaceful purposes', most participants are realistic about the limitations of such a proposal. Furthermore, they realize that several of the security uses of the sea, even though they cause occasional irritation to particular states, generally contribute to the stability of world relations."[27]

[27]P. Sreenivasa Rao, The Public Order of Ocean Resources: A Critique of the Contemporary Law of the Sea (Cambridge: The MIT Press, 1975), p. 200.

CONSEQUENCES OF FAILURE

There is every likelihood that the ongoing UNCLOS III negotiations will not result in a comprehensive LOS treaty. It is, therefore, appropriate to consider what will be the effects upon naval operations and the ability to perform naval missions of a continued unstructured oceans regime. There is, of course, an entire range of possible consequences, but for the sake of analysis, they will all be considered as resultants of increased jurisdictional claims by coastal states. The specific requirements of the DCIT as well as its limitations would not be in force.

The strategic deterrence mission could be severely affected as straits states might claim sea lanes as internal waters, or apply restrictive or descriminatory regulations on vessels transiting. Transit by SSBN's, if permitted, would be required to be on the surface with flag showing. The determination of whether or not passage is innocent could be subjective to such an extent that warships or nuclear-powered submarines could be restricted. The overall effect of such actions would be severe to our strategic fleet ballistic missile submarines. They could not only be tracked through straits by potential enemies but the risk of collision due to their low profile, degraded sensors and limited surface maneuverability would be far greater than when submerged. The area of operations for the SSBN force as well as all other naval forces could be reduced to only

about 64 percent of the world's ocean if 200 mile jurisdictions are claimed.[28]

The other naval mission areas would suffer the same reductions in effectiveness as the strategic deterrence mission. As carrier, amphibious and general purpose naval forces attempt to conduct normal operations they could be discriminated against in their right to transit through international straits and archipelagos. They could be forced to transit outside of 200 mile territorial waters or risk confrontation with various coastal states. Since the determination of innocent passage would be decided by such states, this traditional freedom could lose its meaning and be jeopardized.[29] Inability to transit from the Pacific Ocean to the Indian Ocean via the Indonesian straits would double the distance traveled while circumnavigating Australia, and would cause a concomitant reduction in reactive response time.[30]

Failure of UNCLOS III would preclude the right of overflight of international straits. Such overflight would

[28]Thomas A. Clingan and Lewis M. Alexander, ed., Hazards of Maritime Transit (Cambridge, Mass.: Ballinger Publishing Co., 1973), p. 20.

[29]David L. Larson, "Security, Disarmament, and the Law of the Sea:, Marine Policy (January 1979), p. 48

[30]Michael Leifer, Singapore and Indonesia. International Straits of the World Series, no. 2 (Aphen aan den Rijn, The Netherlands: Sijthoff and Noordhoff, 1978), p. 165.

require coastal state permission which could be withheld in times of international crisis. Carrier battle groups could thus lose logistic support from carrier on board delivery (COD) aircraft, with a loss in operational readiness and flexibility.[31]

The loss of a well defined exclusive Economic Zone with specified high seas freedoms for warships could permit coastal states to challenge such high seas freedoms as weapons testing, military oceanography, intelligence collection, submarine patrols and ordinary naval maneuvers. Such restrictions would vary depending on the local political climate and the degree of jurisdiction (sovereignty vs. resource protection) claimed over the extended area. They could very well vary significantly among different states in the same geographic area, a further complication to an operational commander's ability to exercise high seas freedoms.

The consequences of failure outlined above comprise a "worst case" scenario. There appears to be a general consensus among authorities on the Law of the Sea that this anarchistic free-for-all is unlikely to occur. Professor Myres S. McDougal of Yale Law School cites the perceptions of common interest, the potential for reciprocity as well as retaliation and a tremendous global cooperation as factors influencing the maintenance of a stable ocean order. He

[31]Robert E. Osgood, New Era in Ocean Politics, Studies in International Affairs, no. 22. (Baltimore: The Johns Hopkins University Press, 1974), p. 106.

also points out that among the United States, the Soviet Union, and Western Europe is the overwhelming naval power of the world and that these countries have sufficient power to promote their common interest.[32] James L. Johnston of Treasury Department's Office of Raw Materials and Ocean Policy has expressed a similar opinion:

> "It is by no means clear that failure to reach agreement in the near term will result in "anarchy and chaos" as is often claimed. The legal regime for the oceans during all of recorded history has been characterized by a general lack of law. Indeed, most human endeavor remains unregulated by the sort of detailed international law discussed in this third UN conference. To characterize the relatively unregulated conduct of human endeavors in general, and use of the oceans in particular as being chaotic would seem to be an exaggeration."[33]

George P. Smith, II in his conclusion to the book, Restricting the Concept of Free Seas, declares that "the edge of apocalypse will not be within imminent view if the Conference should end its working sessions without a popularly subscribed treaty." He goes on to endorse bilateral and limited multilateral agreements and temporary measures and states the belief that decisive action on the ocean regime should be taken by the end of this century.[34]

[32]Ryan C. Amacher and Richard James Sweeney, The Law of the Sea: U.S. Interests and Alternatives (Washington: American Enterprise Institute for Public Policy Research, 1976), p. 158.

[33]Ibid., p. 163.

[34]George P. Smith II, Restricting the Concept of Free Seas: Modern Maritime Law Re-evaluated (Huntington, N.Y.: Robert E. Krieger Publishing Co., 1980), p. 120.

Former U.S. Ambassador to the Law of the Sea Conference, John Norton Moore, in a national ocean policy paper realizes the importance of naval interests and provides significant recommendations for the U.S. approach to UNCLOS III (discussed later). He also expressed a clear understanding of the interrelationship of various national interests when he stated that those who expect deep seabed interests to be sacrificed for other interests, "are simply out of touch with realities in the Senate and Executive Branch."[35]

In a rather biting and controversial article for Foreign Affairs magazine, Richard G. Darman describes the LOS Conference as being peopled with international lawyers and codifiers who want a neat, static world. He provides that failure of the conference might result in a system that is only marginally less efficient rather than disastrous. He raises a question about whether a comprehensive treaty is even in the best interests of the United States if we are willing to trade off among desirable proposals rather than linking them.[36]

[35]John Norton Moore, "A Foreign Policy for the Oceans," in The Oceans and U.S. Foreign Policy, Center for Oceans Law and Policy, University of Virginia, Oceans Policy Study series, no. 1:4 (Charlottesville: The Mitchie Co., 1979), p. 5.

[36]Richard S. Darman, "Law of the Sea: Rethinking U.S. Interests," Foreign Affairs (January 1978), p. 376.

CONCLUSION

Clearly the provisions of the DCIT developed through UNCLOS III would provide an acceptable operating environment for the U.S. Navy. Recognition of a twelve mile territorial sea imposes a small limitation on operating areas, which generally speaking, already conform to the proposed regime. The archipelago rule restricts operations within waters that have now been redefined as internal. Overall, however, the UNCLOS III regime conveys an order wholly supportive of the needs of national security and the U.S. Navy. The new concept of transit rights through international straits and archipelagos ease the concern generated by a twelve mile territorial sea and the archipelago rule. Provision for submerged transit as well as overflight provides an international order far superior to the resultant of the 1958 Conventions. Delineation of duties and responsibilities of flag and coastal states serve to remove the adverse implications from coastal state interpretation of innocent passage. The sovereign immunity of warships is re-enforced in the DCIT and no third party interference is permitted which would erode that immunity. The concept of an exclusive economic zone does not infringe upon high seas freedoms and the international authority's control over the deep sea bed is limited only to exploration and exploitation.

The proposed treaty is good for the navy; it provides a fully acceptable framework for operations now and in the

future. Regrettably, as has been made clear in the aforementioned New York Times articles, there are other national interests with a stake in UNCLOS outcome that have not fared so well. National ocean mining interests are dismayed with the prospect of sharing their benefits with developing nations; with the control of an international body over their ability to mine, and also with the requirement to provide their technology to such a body. The pros and cons of seabed mining are not within the scope of this treatment; these problems are pointed out to demonstrate that other factors, in addition to an efficacious regime for the U.S. Navy, must be considered.

Former LOS Ambassador John Norton Moore has outlined seven steps recommended to enhance the chances of achieving an agreement acceptable to all U.S. interests. They are summarized here:

1. Abandon pressure for conclusion "in just one more session." Make it clear that we are willing to continue to negotiate, but will not accept a bad agreement.
2. Move forward with deep seabed mining legislation that will become a permanent system only if UNCLOS III does not succeed. (As has been accomplished by the Hard Minerals Act).
3. Fundamentally change the U.S. position on deep seabed mining, with a Conference shock

as the U.S. toughens up on particular weak points in the proposed structure. (A current undertaking, as seen in the New York Times).

4. Toughen up with respect to the EEZ, particularly marine scientific research and treatment of whales.
5. Avoid illegal unilateral actions (deep seabed mining is not one) and vigorously protect such action by other states. Make it clear that, absent a treaty, we will not recognize EEZ's, archipelagos, or any coastal state control over scientific research or pollution or any other areas not covered by the 1958 Geneva Convention or other international treaty.
6. Work vigorously with like minded states (including the U.S.S.R.) to present a united policy front.
7. Work closely with Congressional leaders to obtain their complete support for this policy.[37]

As may be inferred from these recommendations, the change in policy does not necessarily portend the imminent destruction of UNCLOS III. It does require a consistent, unified approach and patient persistance toward the goal of a treaty which is fully acceptable in all areas.

[37]Moore, pp. 11-13.

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