MISSION IMPOSSIBLE

Preservation of U.S. Maritime Freedoms

Bruce Harlow

the McKERNAN lectures

Donald L. McKernan Lectures in Marine Affairs

May 16, 1985

Mission Impossible?

Preservation of U.S. Maritime Freedoms

Bruce Harlow

Washington Sea Grant Program
in cooperation with the Institute for Marine Studies
University of Washington, Seattle, WA 98195

This publication is supported by grant number NA84AA-D-00011, projects E/MS-7 and A/PC-5, from the National Oceanic and Atmospheric Administration to the Washington Sea Grant Program.

Author's Note: The views of the author should not be taken as reflecting official positions of the U.S. Government.

Keywords: Law of the Sea, maritime freedoms, international negotiations, lectures.

WSG 85-5

Contents

Acknowledgment

Participating in this lecture series is particularly meaningful to me because I had the pleasure of working with Don McKernan from the mid to late 1960s while he superbly represented the United States in numerous international fisheries negotiations. Ambassador McKernan was equally comfortable and effective, whether involved in rough and tumble, shirt-sleeve discussions with domestic fishermen, or very formal negotiations with delegations from other nations. He will be long remembered as the prime mover in the development and negotiation of a host of stable and equitable fisheries agreements.

Preface

In 1974, with much fanfare, most of the nations of the world gathered in Caracas to open negotiations on a comprehensive law of the sea treaty. The undertaking was an ambitious one, indeed. Their intent was to codify not only the rules for all existing maritime activities, but also to develop rules for an industry that didn't exist—deep seabed mining. It was generally considered that the negotiations could be wrapped up in a matter of 1 or 2 years. Instead, the marathon sessions went on for almost a decade. Finally, in 1982 a draft treaty was affirmatively approved by an overwhelming vote and opened for national signature. The final text ended up with 320 articles spanning virtually the entire scope of peacetime maritime activities and state's rights in this vital area covering two-thirds of the earth's surface.[1]

Because of irreconcilable problems with certain provisions dealing with deep seabed mining, the United States voted against the draft convention and has declined to sign it. Some 159 nations and international organizations have signed so far. Important maritime powers and allies included on the list are France, Japan, USSR, PRC, Australia, Italy, Netherlands, Spain and Canada.

The U.S. decision not to sign the treaty has triggered a spirited debate as to whether the United States, as an outsider, can legally enjoy the navigational rights codified therein. The answer is no—if the treaty created new and unique navigational rights, and is intended to establish a closed system applicable only among contracting parties. On the other hand, the answer is yes—if the treaty reflects customary practices or is intended to establish a universal navigational system. This is a classic case of the conclusion being dependent upon the premise.

The waters were muddied further by the fact that the 1982 treaty was negotiated as a "package deal." As will be explained later, essentially what this means is that the treaty was negotiated as an indivisible whole. Therefore the question has been raised: Does this preclude the United States, in a post-negotiation environment, from asserting rights consistent with certain articles while rejecting others? In other words, since it was agreed that the convention was a "package deal," isn't it inappropriate for the United States to undertake now a "pick and choose" approach? Many of the delegates to the conference argued that to enjoy *any* of the rights under the convention, a nation must assume *all* of its duties.

As an ex-bureaucrat who has been involved in law of the sea matters in the Department of Defense since 1965, I would like to share with you my perspectives on the origins of the 1982 convention, what was accomplished in the course of the negotiations and some of its post-negotiation ramifications. It might be said that such perspectives, for better or worse, reflect some of the premises that influenced certain aspects of the

U.S. position before, during and after these marathon LOS negotiations. Perhaps along the way, I also can shed some light on how and why we got ourselves into this rather complex jurisprudential fix.

[1] For the official text in the final articles and related background documents, see *The Law of the Sea*, (New York: United Nations, 1983, Sales no. E83.V.5.)

Setting the Stage

For the past several centuries the world's oceans have been predominantly governed by two fundamental principles. First, the oceans can be used by all, for any peaceful (read, non-aggressive) purpose, short of a national claim to sovereignty. The only limitation to this principle, described as the "freedom of the high seas," is that the activity must be undertaken with reasonable regard for similar rights of other users. The area in which this principle is applicable is called the regime of the "high seas." This regime has historically included all ocean areas seaward of a 3-mile band of coastal waters. The second principle, in contradistinction to the first, is that coastal states may exercise complete jurisdiction and control over this narrow band of water adjacent to their coast, a regime termed "territorial seas." Other nations have no rights in these "territorial seas," except for the right of "innocent passage" which permits ships of all nations to traverse foreign territorial waters without prior notification or approval.

A fundamental point that will arise later in the discussion, is that these two oceanic regimes which are deeply rooted in customary law—territorial seas and high seas—were designed to maintain a balance between the legitimate needs of coastal states on one hand, and the legitimate needs of maritime nations, on the other. In my judgment, a cardinal principle flows from this historic approach: No nation may unilaterally make or enforce a claim that upsets this balance without violating historic principles of customary international law. It cannot be viewed as an accident of history that the 3-mile limit for territorial seas left a high seas corridor through virtually all international straits.[2] By contrast, a 12-mile territorial sea would eliminate the high seas corridor in more than 200 international straits. For centuries many of these narrow passages have been used as essential arteries in the exercise of inter-ocean navigational rights.

In the immediate post World War II period, however, these traditional principles began to be buffeted by the high winds and heavy seas of change.

Many commentators argue, with some validity, that a significant catalyst for change was the 1945 Truman Proclamation in which the United States claimed exclusive jurisdiction and control over the resources of the continental shelf.[3] As the reader is aware, the U.S. conti-

[2] Certain authors conclude that the 3-mile territorial sea limit stems from a centuries old "cannon-shot" rule. That is, a nation could not claim areas beyond that which it could control by its shore batteries—the maximum range at that time being 3 miles. It is safe to assume, however, that the pragmatists representing the great maritime powers had other considerations in mind as well, not the least of which was the maintenance of high seas corridors through key international straits.

[3] Executive Order 9633 of 28 September, 1945 provided in pertinent part: "the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."

nental shelf extends, in most areas, well beyond the territorial sea. Although the claim is to the resources, not to the area itself, this distinction was either lost or ignored by other coastal nations determined to pursue their particular interests. Often their assertions took the form of territorial sea claims over broad expanses of ocean areas off their shores.

The situation was exacerbated by the absence of any formal international agreement which established the maximum breadth of the territorial sea. Driven by perceived resource or security needs, coastal states were thus emboldened to argue that they were free to establish broader limits than those previously recognized by customary international laws.[4] Often these states made the point that their actions were simply a variation on a theme established by the United States in the Truman Proclamation.

Apart from the Truman Proclamation, there appeared to have been an insatiable desire among many coastal states to bring large ocean areas under their control for political as well as practical purposes. It was simply easier and more politically fulfilling to proclaim complete jurisdiction over a broad territorial sea than it was to limit their claim to a specific functional purpose. It is my opinion that—with or without the Truman Proclamation—the problem of proliferating territorial sea claims would have arisen generally as it did. It was spawned by competition for ocean resources, concern for environmental protection, national security considerations and last but not least, plain old domestic aggrandizement. The Proclamation merely served to widen the crack in the flood gates.

It is worth noting that the functional approach taken by the United States in the Truman Proclamation was a legitimate attempt to perfect a limited coastal claim without disturbing traditional high seas freedom. This approach made sense then as it does now. Indeed, a mere 13 years later, it was codified in the 1958 Convention on the Continential Shelf.

The 1982 Convention extends the same functional approach to several newly codified regimes. For example, it permits a claim to all ocean resources in a 200-mile "Exclusive Economic Zone" but limits the breadth of territorial seas to 12 miles. It is also significant to note that the Convention delineates certain heretofore "high seas" navigational rights in international straits overlapped by "territorial seas." Thus, the

[4] A prime example of this phenomenon arose out of the 1952 Santiago Declaration. In it Chile, Ecuador and Peru agreed to exrcise exclusive sovereignty and jurisdiction over the oceans off their respective coasts to a distance of 200 miles. Although the verbalization of their assertions carried the appearance of a territorial sea claim, their actual thrust was directed to the resources in the area, particularly fish. The Declaration is reprinted in *Hearings before the Committee of Merchant Marine and Fisheries on H.R. 9584*, House of Representatives, 83rd Congress, 2nd session, July 2, 1954, pp. 33-34.

historic jurisdictional purity and functional polarization of both the high sea and territorial sea regimes have been blurred.[5]

To place these developments in perspective, it is important to understand some of the history of the post WW II struggle to codify the law of the sea, and in particular, efforts to establish an internationally agreed breadth of the territorial sea. Since its earliest history, the United States has been a staunch supporter of the 3-mile limit. It is understandable, therefore, that the diffusion of state practice in this regard was a source of considerable concern.

In the early 1950s, the International Law Commission (ILC) of the United Nations began an effort to codify the law of the sea in a comprehensive manner. In 1956 the Commission adopted a set of proposed treaty provisions which formed the beginning point for the First U.N. Conference on Law of the Sea, which convened in 1958. It is significant to note that a majority of the ILC concluded in the commission's 1956 report that, although custom and practice were no longer uniform with regard to the breadth of the territorial sea, international law would permit a claim up to 12 miles.[6]

Thus, the entire U.S. delegation to the 1958 conference realized it would be extremely difficult to obtain wide international support for a 3-mile territorial sea. At the opening of the session, 21 states still claimed the traditional 3 miles, but by then 39 states claimed territorial seas in excess of 3 miles. In the face of this formidable reality, the United States proposed that the conference adopt a compromise of a 6-mile territorial sea, with an additional 6-mile fisheries zone. When an agreement failed on this, and all other similar proposals, the United States made it clear that it would continue to adhere to its 3-mile claim and would not recognize other claims in excess of 3 miles.[7]

The Second U.N. Conference on Law of the Sea, which convened in 1960 for the primary purpose of resolving the territorial sea issue, likewise failed to reach agreement. Again, after agreement failed, the United States announced adherence to its original 3-mile position.

[5] See Part III, Section 2 of the 1982 Convention. This interspersing of "zonal" claims and "functional" rights, unless prudently implemented, could be a source of confusion and confrontation. Under this approach it is important to bear in mind that international ocean areas take on certain national characteristics and, by the same token, national regimes assume certain international characteristics.

[6] Cited in Lewis Alexander, editor, *Law of the Sea: Offshore Boundaries and Zones* (Columbus: Ohio State University Press, 1967) p. 191.

[7] At the end of the conference Arthur Dean, Chairman of the U.S. Delegation stated: "It is the view of my Government . . . that the 3-mile rule is established international law; that it is the only breadth of territorial waters on which there has ever been anything like common agreement; and that unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but are indeed in conflict with the universally accepted principle of the freedom of the seas." Department of State Bulletin, No. 980, April 7, 1958, pp. 574, 576-580.

On the heels of these failures, territorial sea claims in excess of 3 miles continued to proliferate. Furthermore, as will be discussed later, pressures were building in Congress for the United States to claim exclusive jurisdiction over fisheries, at least to a distance of 12 miles off shore—a right historically tied to the territorial sea.

Accordingly, by 1965 there was a perceived need in the Defense Department for an urgent "zero-base" study to rethink these maritime issues to see if a workable, cost-effective solution could be found that would preserve historic high seas freedoms and at the same time accommodate competing maritime and coastal state interests.

Changing Navigational Practices

Accordingly, upon my arrival for duty in the Pentagon in 1965, I was assigned to a working group which was tasked, as a matter of high priority, to look into these law of the sea developments. Developments which of course, were of great interest and concern to the U.S. Navy.

At the time of my arrival the Navy's operational practices were changing. In the past, U.S. naval units had routinely operated in areas between 3 and 12 miles off foreign shores. But by 1965, the Navy had begun to limit more frequently the high seas operations of its units to areas beyond 12 miles. The primary reason for this, was the desire of the Departments of Defense and State to avoid a point of potential friction and confrontation. The logic was simple: Why complicate our relations with these states, and prejudice other important foreign policy interests, by exercising high seas rights (as distinguished from the more limited right of innocent passage) simply to demonstrate what was considered to be an obvious legal right. It was understood, of course, that our units would operate in these contested areas between 3 and 12 miles if national security considerations required.

It is important to note, however, that these self-imposed constraints had no impact on the Navy's navigational practices in international straits, including those overlapped by claimed territorial seas. Straits continued to be fully utilized in a manner that could be legally justified only if the traditional restrictions of "innocent passage" were not applicable. That is, the broader traditional high seas right of navigation—which includes the right of submerged passage and overflight—could be exercised. Under the traditional rules of innocent passage in territorial seas, submarines are required to navigate on the surface and show their national flag—and there is no right of overflight.

Many international lawyers considered at the time, that these broader navigational rights could be legally exercised in straits only if they comprised high seas.[8] The logic of this, of course, dictated strict

[8] As far as I am aware, at that time there was no official articulation of the legal basis for distinguishing between navigational rights in international straits and territorial seas generally. It appears the practice simply reflected the necessity of such activity including frequent navigation within 3 miles of one or both promontories in straits.

adherence to a policy of not recognizing territorial sea claims in excess of 3 miles. The Navy was therefore caught in a dilemma: On the one hand, it was important to avoid disputes by continuing its de facto acquiescence to 12-mile claims in non-critical navigation areas, but on the other hand, it was vital not to weaken its legal position *vis à vis* international straits which were overlapped by such claims.

In practical terms, what we observed was that the routine navigational needs of the U.S. Navy could be met if:

- U.S. surface, sub-surface and air units could enjoy traditional high seas rights in ocean areas beyond 12 miles from foreign shores,
- Such units could exercise similar rights for the purpose of navigating on, under, or over international straits, and
- Surfaced units could engage in innocent passage in territorial seas generally.[9]

Our examination of the operational practice of certain of our allies and the Soviets convinced us that, in a de facto sense, those nations were similarly situated. The Soviets, for example, although officially recognizing the right of a state to claim a 12-mile territorial sea, frequently operated submarines submerged through international straits overlapped by such 12-mile claims.

Post World War II practice of states recognized what law of the sea lawyers had not. International straits had emerged as a separate de facto regime because of practical necessity. Territorial sea claims up to 12 miles were acceptable *except* where they overlapped international straits. I came to the rather startling legal conclusion that these practices were sufficiently widespread to have brought about a change in customary law. It followed that many maritime nations, including the United States, were asserting a lawful but, as yet, unarticulated navigational right in international straits—in contrast to their assertion of a more limited right *vis à vis* territorial seas generally. As mentioned previously, in portions of territorial seas which did not comprise an international strait, maritime nations were seemingly content to abide by the traditional rules of innocent passage.

As it turned out, the next 18 years were consumed in an effort to synchronize this perceived reality with the machinations of international lawyers and policy makers who were involved, in ever increasing numbers, in the effort to articulate and codify the law of the sea in what, at times, seemed to be an endless number of ways.

[9] 1958 Convention on the Territorial Sea and the Contiguous Zone, Articles 2 and 14.

Development of a Game Plan

After participating in the review of the operational seascape through the summer of 1965, my next challenge as a bright eyed and bushy tailed lieutenant commander was to flesh out my legal hypothesis concerning the navigational rights of warships in international straits overlapped by claimed territorial seas.

It took little research to discover that many distinguished commentators had, from the 1930s to the 1950s, concluded that the right to navigate freely, in a non-threatening manner, through international straits, was a principle well grounded in customary international law. In this regard, it is of interest to note that the 1930 Hague conference signaled the beginning of the modern struggle to codify a comprehensive law of the sea regime.

The draft articles prepared in preparation for the 1930 Hague Conference on law of the sea did not specifically address the issue of navigational rights in international straits. The preparatory League of Nations documents did, however, state:

> . . . a rule of law not without practical importance which has been established as regards rights in Straits serving as a passage to the sea, is that such a strait may never be closed.[10]

Further, League of Nations commentary concerning related articles of the second committee of the Hague Conference stated:

> Under no pretext, however, may there be any interference with the passage of warships through Straits constituting a route for international maritime traffic between two parts of the high seas.[11]

Eric Bruel, in his classic work on international straits, commented on this aspect of the Hague Conference. In discussing the question as to whether warships enjoy the right of passage in straits, he stated:

> . . . the states' attitude at the Hague Conference, of 1930, seems to have created greater certainty, so that warships, at any rate on principle, have the right to pass through territorial waters in straits in time of peace, regardless of whether they may be taken to have the same right in the other parts of the territorial waters.[12]

In a landmark law of the sea decision, the International Court of Justice concluded in the Corfu Channel case:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without a previous authorization of a coastal State, provided that the passage is innocent. . . . Unless otherwise prescribed in international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[13]

The 1954 report of the ILC contained a provision related to the right of warships in straits. It provided:

> There must be no interference with the passage of warships through straits used for international navigation between two parts of the high seas.[14]

The position of the United States on the issue of navigational rights in international straits was made clear in a 1957 aide-memoire to Israeli Ambassador Abba Eban regarding access to the Gulf of Aqaba. Secretary Dulles stated:

> . . . the United States believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto. . . . In the absence of some overriding decision to the contrary, as by the International Court of Justice, the United States, on behalf of vessels of United States registry, is prepared to exercise the right of free and innocent passage and to join with others to secure general recognition of this right.[15]

If nothing else, these commentators were reflecting a practical reality. For it cannot be reasonably disputed that the navigational needs of the international maritime community are significantly greater in international straits than is the case in territorial seas generally. Except when entering port, ships can generally navigate so as to avoid entry into territorial seas that do not comprise straits. But there is no such choice in the case of a strait overlapped by territorial seas. Indeed, as I have attempted to stress previously, the exercise of navigational rights in straits is an inseparable and essential element of the principle of freedom of the high seas and maritime communication.

Against this backdrop, one should not be surprised that the United States approached the 1958 law of the sea conference with an admixture of trepidation and circumscribed hope. Indeed, one can wonder if there could have been any reasonable expectation that agreement could be reached on these sensitive navigation issues, given Soviet bloc and third world opposition. As it turned out, negotiations were lengthy and heated on the threshold issue of whether warships were entitled to the right of innocent passage in territorial seas generally.

[10] League of Nations Publication, C 43. M. 18, 1926. V, p. 17.

[11] League of Nations Publication, C. 351. M. 145, 1930. V, p. 130.

[12] Eric Bruel, *International Straits*, translated by Messrs. Pratt and Byriel, 1947, Vol. 1, p. 202.

[13] International Court of Justice Reports 1949, Vol. 5, p. 28.

[14] United Nations Document, 1954, A/2693, p. 20.

[15] Department of State Bulletin, March 11, 1957, p. 393.

Fortunately, a key plenary vote on a provision that would have required prior authorization for warship passage in territorial seas failed to obtain the necessary two-thirds vote for approval. It should be noted parenthetically, had this provision required both notification and authorization, it might have received the necessary votes for approval. In any case, because of this turn of events, specific reference to warship passage in territorial seas was omitted in the final text. Thus, it was possible to argue that a remaining provision, dealing with innocent passage for "all ships," was applicable, by negative pregnant, to warships. It is more accurate to conclude, however, as evidenced by the debate 24 years later at the Third U.N. Law of the Sea Conference, that the opposing sides simply reserved their respective position.

The 1958 Convention on the Territorial Sea and Contiguous Zone addresses the question of navigation in international straits only indirectly. It provides that the right of innocent passage in territorial straits, as opposed to territorial seas generally, cannot be "suspended." Passage is generally[16] defined in the Convention as innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State." But, as pointed out previously, the basic question of whether warships were entitled to the right of innocent passage in territorial seas generally was not settled informally by the negotiations, much less affirmatively codified.

As the 1958 conference demonstrates, regrettably, discussion and articulation of maritime issues at a formal international conference often cause as many problems as they solve. I have discovered that nations frequently prefer not to be "pinned down" on a point of law dealing with sensitive maritime matters, especially when they impact on the vital national security and economic interests of those nations.[17]

Meanwhile, away from the conference table, the United States and other maritime powers continued to exercise their perceived right of innocent passage in territorial seas generally and what amounted to a high seas freedom of navigation through international straits.

[16] 1958 Convention on the Territorial Sea and Contiguous Zone, Article 16.

[17] There are also practical reasons why nations are often reluctant to make firm commitments in a treaty. As pointed out by Arthur Dean in particular reference to the law of the sea conferences: "There is an understandable reluctance on the part of national governments to enter into agreements with other countries binding them irrevocably to future action or inaction. Circumstances, science, and technology change, and nations should not always assume obligations into the indefinite future for better or for worse. As a general rule, therefore, most nations prefer to work out ad hoc arrangements with other countries rather than to enter into formal agreements which may prove unduly restrictive in the light of later knowledge."

Dean is quoted in *International Law Studies*, U.S. Naval War College, Volume 61, 1980, p. 485. It should be emphasized that the other alternative to enlightened treaty avoidance, which we have seen too frequently, is for nations to preserve their flexibility by entering into treaties which are purposefully vague.

Gaps, ambiguities and all, the 1958 territorial sea convention came into force in 1964 as a binding multilateral treaty. It was our practice in 1965, therefore, to cite it whenever possible, as an authoritative blueprint for the Navy's maritime conduct. In order to do this, in light of the navigational rights asserted by the United States and other maritime powers, it was necessary to adopt at least one of three interpretative approaches:

- The concept of non-suspendable innocent passage in straits, as used in the Convention, had a content different from innocent passage generally. That is, it was intended to be more akin to a high seas navigational right, which had historically accrued to warships as well as commercial vessels.
- Or, the Convention's navigational provisions were legally applicable only in the context of a 3-mile territorial sea. The United States, of course, emphasized this point officially at the end of both the 1958 and 1960 Conferences.
- Or, all issues of warship navigational rights were beyond the scope of the convention, as evidenced by the negotiating history and lack of specific addressal in the agreed text.

The Soviet Union having recognized 12-mile territorial seas and having adopted legislation restricting the right of innocent passage of warships in its territorial seas was, as a practial matter, stuck with the first interpretative approach—if it wanted to maintain that its warships possessed navigational rights in straits overlapped by 12-mile territorial seas. I suspect that the Soviets did not fully consider this question at the time, because their entire negotiation thrust through 1958 was coastal oriented. It soon became clear, however, Admiral Gorshkov was changing that orientation.

As a footnote to this story, one might ask, how could the United States have proposed a 6-mile territorial sea in 1958 and again in 1960 without addressing the straits issue? Recognizing that a 6-mile territorial sea would overlap 53 key straits, the question is far from academic. I have asked many people who were directly involved in the negotiations and have yet to receive a fully definitive answer. My best guess is that they determined there was no reasonable likelihood of successfully negotiating the straits issue, considering the diplomatic realities existing at the time. The U.S. delegation could have concluded that solving the breadth of the territorial issue would be, at least, half a loaf. And, after all, the straits question was being handled, albeit on a low visibility basis, through the process of customary state practice.

The following were the major conclusions of my analysis completed in the summer of 1966:

- The U.S. Navy was not violating the 1958 Convention on the Territorial Sea and Contiguous Zone by continuing its navigational practices in international straits. This would be the case, even if the United States were to accept the general

proposition that coastal states may legally assert a 12-mile territorial sea.

- I rejected the notion that by recognizing 12-mile territorial seas the United States would, *ipso facto*, be legally bound to recognize all the attributes that were historically applicable to 3 mile-territorial seas. As, for example, rules relating to innocent passage or neutrality. All such attributes had to be examined on their own merits, to determine whether their application to a 12-mile territorial sea upset the historic balance of rights between coastal states and maritime powers. In other words, constraints on high seas freedoms that made sense with a 3-mile territorial sea had to be examined on a case-by-case basis, to determine if they made sense, presupposing a 12-mile claim.
- In the event coastal states agreed that their 12-mile claims would not prejudice historic navigational rights in straits, it seemed to me that such claims should be viewed as reasonable and consistent with emerging customary law. On the other hand, for example, if coastal states insisted that, because of their expanded claim, the right of submerged transit and overflight were thereby terminated in straits, an appropriate response would be to reject the entire claim.
- To make the best of a difficult and ambiguous legal and political situation, it was considered that the United States should pursue what I termed a "double de-linkage" policy. That is, de-link the concept of territorial seas from fisheries and resource interests, following the contiguous zone and continental shelf precedents. And secondly, de-link the issue of navigational rights in straits from the general issue of the breadth of the territorial sea.

It seemed logical that all international straits, absent internationally agreed exceptions, should be treated uniformly. As a matter of principle and practicality, straits are critical to the navigational interests of the international community regardless of the distance from promontory to promontory. It makes little sense to speak of one regime for a strait 5 miles wide as opposed to one 10 miles wide.

My first opportunity to express some of these thoughts in public came at the first conference of the Law of the Sea Institute held at Kingston, Rhode Island in June, 1966. In a paper entitled "Freedom of Navigation," I stated, *inter alia*,

> Recognizing that one of the sources of international law is the custom and practice of states, it seems clear that the United States is approaching the point in time, when it will be difficult, if not impossible, to maintain that a state may not legitimately claim, in accordance with accepted principles of international law, a territorial sea belt in excess of three miles, up to twelve miles. It is this growing practice of states which, in my estimation, requires a reappraisal of the territorial sea concept.[18]

After discussing the general nature of the problem, I mentioned the first element of the de-linkage approach:

> One possible solution to the territorial sea dilemma is to create special zones of limited jurisdiciton without increasing the territorial sea claim itself. Such jurisdiction might be for the limited purpose of preventing foreign intelligence activities or fishing.[19]

The conclusion, however, that engendered the most contention at the time involved the second de-linkage element. In this regard I suggest the following:

> Another possible solution that bears analysis is to negotiate, on a multilateral or bilateral basis, for the maintenance of high sea passageways through international straits. This would permit extensions of the territorial seas without unduly jeopardizing the mobility of our naval forces. . . . However . . . international safeguards would necessarily have to be established . . . as a substitute or quid pro quo to the protection afforded coastal states by the present concept of innocent passage.[20]

Over the years I have been criticized for "re-inventing" international law to suit the needs of the U.S. Navy. The simple truth is, however, if "law of the sea" is not to be observed in the breach, it must take into account the widespread practices of the maritime community, which confirmed the continued importance of such rights notwithstanding growing acquiescence to 12-mile territorial sea claims generally.

While confessing to being result oriented, I have never believed that a cost-effective solution to the fulfillment of national interests in the light of changing circumstances, could be found in unilateralism. This is not to be confused, however, with the firm and frequent exercise of rights in accordance with established operational patterns, which is entirely appropriate. It is important to bear in mind that the U.S. Navy did not suddenly undertake any new activities in international straits. Whatever the legal theory, what the Navy had in mind was simply to continue the same practices it had come to rely on as part of its post WW II global defensive strategy.

As mentioned previously, when dealing with important maritime issues, states are often reluctant to codify the rules explicitly. Thus, in certain instances the pattern of state practice is the best, if not the only,

[18] Lewis Alexander, editor, *Law of the Sea: Offshore Boundaries and Zones* (Columbus: Ohio State University Press, 1967) p. 192.

[19] Ibid., p. 193.

[20] Ibid., p. 194.

evidence of customary international law. As a matter of fact, it's the best treaty interpretation tool I know of. As the saying goes, when the terrain varies from the map, you have got to go with the terrain.

Growing U.S. Maritime Schizophrenia

During most of the post WW II period the thrust of U.S. maritime policy was oriented almost entirely in the direction of preserving U.S. maritime freedoms, particularly the Navy's global navigational freedoms. Other interests that might cut across the grain were consistently subordinated. While that had been the case in the past, by 1965 the picture was changing rapidly, U.S. maritime policy was being driven for the first time in history by two sets of equally strong competing interests: coastal versus distant water fishing interests, and coastal versus global environmental, mineral resource, and security interests.

Several events triggered a fundamental change in U.S. thinking. First, was the announcement of Great Britain in 1964 that henceforth it would recognize 12-mile fishing zones. This decision, coming as it did from a close ally and a nation with a rich maritime tradition, was greeted with a degree of shock and consternation, at least in the U.S. Defense Department. This approach was further legitimized when, several months later, fifteen European members of the European Fishing Convention jointly recognized the validity of such fishing zones. The second factor—one much closer to home—was the increasing domestic concern over the alarming numbers of foreign fishing fleets exploiting our East and West coast fishing grounds. While one hundred or so such ships were evident in 1955, eleven years later the foreign fleet had swelled to more than a thousand vessels, including huge floating fish factories.

Meanwhile, the domestic fishing industry had gained two powerful advocates—Senators Bartlett and Magnuson. In 1966 they sponsored legislation that provided for exclusive fisheries jurisdiction out to 12 miles. This was to be the moment of truth for the Defense Department. After several months of hand wringing, the Navy determined it would be in its best interest not to oppose the legislation. Reflecting a considerable degree of political realism, Rear Admiral Hearn, the Judge Advocate General of the Navy, addressed this legislation in testimony on behalf of the Department of Defense before the Subcommittee on Fisheries and Wildlife in June, 1966. In testimony that signaled a fundamental change in long standing U.S. maritime policy, he stated:

> Since 1793 the United States has consistently maintained a territorial sea of three nautical miles and it is our policy to protest claims of other states beyond that limit. All waters seaward of the narrow belt are high seas to which certain freedoms, including fishing and navigation are extended to all nations alike. The Navy has always strongly supported this position and because we have always been aware of the intimate identification of the territorial sea with exclusive fishing rights we have consistently opposed the extension of exclusive fishing limits beyond the territorial sea. We have felt that as long as fish and sovereignty were lumped together, extension of fishing limits could only derogate from our position on the territorial sea. At the same time we have consistently held to the position that fishing rights and freedom of navigation could be separated and we have urged this position in the past. If this separation could be successfully made we have felt that it would be in our best interests to make it.[21]

This, of course, tended to weaken our traditional territorial sea position. As Admiral Hearn pointed out, up to that point the United States had maintained that, absent an agreement to the contrary, exclusive fisheries jurisdiction was an associated attribute of a territorial sea claim.

As the coastal fishing interests continued to beat the drum, there were increasing numbers of people in the Administration who suddenly decided it was an opportune time to join the coastal jurisdiction band wagon. They seized the moment to push for additional coastal state jurisdiction over environment, scientific research and resource matters. They provided additional political support to the policy shift toward broader assertions of jurisdiction in U.S. coastal waters. There were even elements in the U.S. Navy who argued that our own claim to a 12-mile territorial sea could prove advantageous from a national security standpoint. Their thought was, why let the Soviets collect intelligence within 3 miles of our shores if we don't operate regularly between 3 and 12 miles of their country.

Up until the mid 60s, the U.S. tuna industry and the Navy had worked together in lock-step to avoid any weakening of the strict 3-mile policy. The tuna industry, to protect its distant water fishing interests—particularly off South America—and the Navy, to preserve its global navigational rights. As a logical extension of the position taken on the Bartlett bill, the Department of Defense proposed in 1966 that talks be held with Chile, Equador and Peru to discuss some movement toward U.S. recognition of their 200-mile fisheries zones. In return, it was hoped we could obtain at least implicit recognition that the area retained its high seas character for navigational purposes. These negotiations were unsuccessful and, needless to say, spelled the end of any positive cooperation between the Navy and the tuna industry on the territorial sea issue.

It may be a statement of the obvious, but it is important to recog-

[21] Quoted in Bruce Harlow, "Legal Aspects of Claims to Jurisdiction in Coastal Waters," in De Witt Gilbert, editor, *The Future of the Fishing Industry of the United States*, (Seattle: University of Washington College of Fisheries) Publications in Fisheries, New Series, Volume 4, 1968, p. 316.

nize that in dealing with law of the sea matters in the United States, one must constantly remind himself that he is involved in an arena of competing political, economic and national security interests—both domestically and internationally—interests that must be accommodated, or, if one wants to undertake a mission impossible, overridden.

The Russian Connection

The turning point in Soviet maritime policy cannot be dated precisely, but undoubtedly an "agonizing reassessment" was well underway by 1965. This should not come as a surprise. By that time, under Admiral Gorshkov's leadership, the Soviets were well along in the development of a formidable blue water navy. One might ask, would not this have been the case in any event, in view of their massive world-ranging fishing fleets and merchant marine. The answer is no. These interests did not require the preservation of submerged navigation or overflight rights in international straits. It was the Soviet Defense Ministry that modified, indeed, dramatically reversed, the traditional Soviet xenophobic, coastally oriented, maritime policy. As indicated previously, the last significant international manifestation of the old policy was at the negotiating sessions of the 1958 Geneva LOS conventions and at the abortive 1960 conference.

Needless to say, the Soviet Fisheries Ministry was deeply concerned with proliferating fishery zone claims, including, in particular, the U.S. claim made in 1966. The shared concerns of the Defense and Fisheries Ministries prompted the Soviet Union to propose in 1967 that a delegation be sent to the United States to discuss informally maritime issues of mutual concern. After some reflection, the United States agreed to the proposal. The United States considered that it would be advantageous to ascertain the current Soviet thinking on several key maritime issues. Indeed, if a mutually satisfactory approach to the territorial sea, straits and fishery issues could be devised, there was some thinking that it might constitute a viable basis for a widely accepted international agreement. After several bilateral discussions, the outline of a satisfactory approach was agreed to, in principle, subject to consultation with out respective allies and other maritime and coastal nations.

The U.S. approach contemplated coverage of only three issues: the maximum breadth of the territorial sea, a special jurisdictional arrangement in international straits and recognition of limited coastal state fisheries jurisdiction beyond 12 miles. The Soviets were reluctant to see the fisheries issue raised in a multilateral forum. Agreement was reached, however, on the other two issues. The approach taken on the territorial sea issue was to provide for a maximum breadth of 12 miles, except in international straits. On the latter point, it was agreed that there should be an explicit provision for a high seas corridor through all international straits that otherwise would be overlapped by territorial seas.

Although each side proceeded to the point of polling other nations on the idea, as it turned out, the US/USSR approach was overtaken by events. Namely, the surging interest of the third world in the creation of a deep seabed mining regime which would codify the "common heritage of all mankind" concept. It soon became clear that any conference convened to consider law of the sea matters would have to come to grips with the entire range of outstanding maritime issues.

Whether, absent these circumstances, the US/USSR approach would have been viable, is difficult to judge. One thing these discussions did accomplish, was to get the Defense Ministry on the Soviet side, and the Department of the Navy on the U.S. side, moving in the direction of another multilateral law of the sea conference. The prospect that, for the first time, the Western and Eastern blocs would not lock horns on these navigation issues, was considered reason for cautious optimism. On the other side of the coin, there is reason to believe that our bilateral agreement on these navigational issues, albeit quickly abandoned as a basis for an international conference, caused the third world to place great emphasis on the "package approach" at UNCLOS III.

Deep Seabed Mining: A Navy Perspective

Were it not for a host of intractable seabed mining issues, the 1982 Convention would be entitled the 1977 Convention. The ability, indeed, the political will to compromise at the negotiating table, was complicated by the fact that the last five years of negotiations dealt almost exclusively with this isolated set of issues.

Not only did deep seabed mining issues delay completion of the work of the conference but, as it turned out, it was the inability to reach agreement on these issues that, in the end, caused the United States not to sign the Convention. It is no small irony that the need to create a seabed mining regime was originally an American idea, introduced, in part, because of our involvement in the Vietnam war.

Many authors correctly relate the commencement of serious international discussion of the seabed mining problem, particularly in the United Nations, to the well-known Note Verbale delivered by Ambassador Pardo of Malta in a speech to the General Assembly in August, 1967.[22] He expressed concern over the lack of established international rules for military and exploitative use of the seabed. Ambassador Pardo argued that developed countries, because of their technological edge, would probably be the first to claim large areas to their own advantage, thus unfairly limiting the access of underdeveloped nations to the great wealth of the seabed. Accordingly, he recommended that the United Nations declare the seabed beyond national jurisdiction as an area requir-

[22] United Nations, General Assembly, *Annual Report of the Secretary General*, Official Records, 23rd session, supp. 1 (A/7201), 1968, pp. 43-46.

ing special international regulation and control, fashioned to protect the interests of underdeveloped nations. Thus, seemingly was born the concept of "common heritage of mankind." The challenge since that time has been to find a universally acceptable, operational meaning to that lofty sounding concept.

Actually, the idea for some form of international regulation of the deep ocean seabed resources was floated in the United States more than a year before Ambassador Pardo's famous U.N. speech. It officially surfaced in a Presidential speech given at a commissioning ceremony of a U.S. oceanographic ship in July, 1966.

By 1965, there was a well-established, albeit informal, group of oceanographers, scientists, and corporate representatives in the United States who were looking into the exploitative potential of manganese nodules. These mineral rich nodules, which look like weathered lumps of black coal between the size of a baseball and a marble, had been located in huge quantities over several large areas of the deep seabed. Some of these "pioneers" and "visionaries" felt that international law, as it presently stood, was not sufficiently specific to cope with the problems that would arise if commercial exploitation was undertaken. Others felt that the cause of world peace would be served if an international organization assumed jurisdiction over this "lawless" area. Those schooled in the arena of land mining found it difficult to envision an ocean mining activity in the absence of a place to "file a claim." With these considerations in mind, the group had circulated several informal papers pointing out that some form of international discussion or negotiation to solve these problems might be warranted.

In a report published in May, 1966, the Commission to Study the Organization of Peace recommended that the ocean areas beyond national jurisdiction "be vested in the international community through its agency, the United Nations."[23] Reasons cited included the need to regulate military activities, and the need to ensure an equitable allocation of profits from ocean exploitation (read, revenue sharing). In other words, some of the profits would go to deserving countries and would provide an independent source of income to the United Nations. Although this was a study conducted by a private organization that had no official governmental standing, it received considerable attention in the national and international maritime community.

Perhaps having in mind the pre-publication work of the Commission, at about the same time, a White House Conference on International Cooperation proposed that the mineral resource of the seabed beyond national jurisdiction be viewed as the "common property of mankind." It

[23] This was a research affiliate of the United Nations Association of the United States of America. The Association report was published in *New Dimensions for the United Nations: the Problems of the Next Decade* (Dobbs Ferry, N.Y.: Oceana, 1966) 17th report, p. 37-38.

is clear, however, that the participants in the White House Conference envisioned exploitation by national or private entities. They concluded, *inter alia*,

> . . . producers must have exclusive mining rights to areas that are sufficiently large to permit them to operate economically and without fear of congestion or interference. And if rights are to be granted for resources that are the common property of the world community, then decisions on the allocation of these rights or on the methods of acquisition must be made within the framework of international law. A specialized agency of the United Nations would be the most appropriate body for administering the distribution of exclusive mining rights.[24]

Interestingly enough, another totally unrelated consideration—our increasingly unpopular involvement in Vietnam—was prompting U.S. decision makers to look for internationally attractive diplomatic initiatives that could serve as a counter-point. As the reader will recall, this was a difficult period for the United States. Opposition to our involvement in the war was growing domestically and internationally. Several presidential advisors considered that an internationalist posture on the issue of deep seabed mining might be helpful in this context. As it was informally expressed to me at the time, it would provide an opportunity for the President to make a positive, non-confrontational "splash."

These various interests converged in July, 1966 when President Johnson included the following language in his speech at the commissioning ceremony:

> . . . under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth (of the deep ocean seabed) to create a new form of colonial competition among maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.[25]

It can be seen that, at least on the surface, the position taken by Ambassador Pardo a year later was remarkably similar to that seemingly taken by President Johnson. I say "seemingly taken" because the truth is, the U.S. position had not been firmly established. Certainly the Defense, Interior and Commerce departments had not taken a position in support of international ownership or control of the mineral resources of the deep oceans. The Assistant Secretary of the Navy was echoing the position of State and Interior Departments when he stated to a Congressional committee in the Fall of 1967:

> . . . it is much too early in our knowledge and understanding of

[24] Quoted in Lewis Alexander, editor, *Law of the Sea: Offshore Boundaries and Zones* (Columbus: Ohio State University Press, 1967) p. 177.

[25] Weekly Compilation of Presidential Documents, 18 July 1966, p. 931.

> the nature of deep ocean resources and of the technology that will be required to exploit them for us to consider major legal questions regarding its exploitation and ownership, certainly too early for us to think that we would know what we were doing if we were to take action to vest control of ocean resources in an international body in a specific way.[26]

As a matter of fact, the question of how the United States should deal with these fundamental issues, was the subject of continuing interagency wrangling for the next 16 years.

Although the Navy had hoped to proceed along the lines of the US/USSR approach previously discussed, by 1968 it became clear that the seabed mining issue was here to stay. By 1970 we realized that, for better or worse, if there was to be any multilateral negotiation, all these issues had to be addressed at a single conference. Perhaps it was a rationalization, but we perceived that, if handled correctly, several advantages could accrue from coming to grips with the seabed issue. This was the assumption, of course, that national access would be preserved. First, the creation of an international mining regime would tend to stop the seaward march of coastal state claims and, second, it would impede national claims to sovereignty over areas of the deep seabed that might otherwise be asserted by mining states.

In any event, by this time, informal consensus was emerging, both domestically and internationally, that the United Nations should once again sponsor a multilateral law of the sea conference to address all maritime issues, real and imagined. Although there was vacillation up to the last minute, the United States in December, 1979, supported a U.N. resolution calling for a law of the sea conference to negotiate a treaty dealing with navigation issues, the continental shelf limit, fisheries environmental matters, dispute settlement, as well as deep seabed mining. Thus was launched the most complex and time-consuming multilateral negotiation in modern history.

The Navy's position during this period was to defer to the other departments and agencies on the technical details of the seabed mining regime which was being negotiated with ever-increasing vigor at UNCLOS III. This was subject, however, to it being clearly understood that any regime agreed to must, (1) afford reasonable national access to the resources, and (2) not interfere with the right to enjoy a full range of high seas freedoms.

With regard to the first point, I should state parenthetically that from 1965 until 1981 neither the Navy nor the Joint Chiefs of Staff were acting out of a concern for national access to manganese nodules, per se. For several reasons, deep seabed mining for nodules was not considered

[26] U.S. Congress, House Committee on Foreign Affairs, *The United Nations and the Issue of Deep Ocean Resources* (Washington: U.S. Govt. Printing Office, 1966) Report No. 999, p. 188.

to be essential from a national security perspective. In any event, it certainly was not considered a viable alternative to strategic stockpiling of essential minerals. Instead, the interest and concern was a matter of fundamental principle: no nation or its nationals should be denied reasonable access to the international areas of the oceans including the seabed. It was considered to do so would weaken the historic doctrine of freedom of the high seas.

The Question of Archipelagos

Any discussion of navigational issues of concern to the U.S. Navy from 1965 onward would be incomplete without a short commentary on the impact of archipelagic claims.

Indonesia, the Philippines and other island nations have long considered that they were entitled to a special territorial status by virtue of their conglomeration of islands. Their primary rationale was that their "territorial integrity" could be properly maintained only if all waters enclosed by a line around their outer-most islands were viewed as internal waters. They argued, in principle that these waters should be viewed internationally as being under their complete jurisdiction and control. In commenting on a 1955 draft report of the International Law Commission, the Philippine representative expressed a view that was typical when he stated:

> . . . all waters around, between and connecting different islands . . . irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines . . . in case of archipelagoes or territory composed of many islands like the Philippines, which has many bodies of water enclosed within the group of islands, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered high seas.[27]

Because of the strategic location of these claimed "archipelagos" and the vast high seas area involved, it is understandable that these claims were of great concern to the Navy. Until 1969, and well after that, officially, the Navy firmly opposed discussion of any compromise. Its position was that such claims were patently illegal and required no recognition by other states.

It was one thing to proclaim full navigational rights in the area, but it was quite another to fully exercise them. With the dramatic improvement in our relations with Indonesia in the 1960s there was constant pressure to find a practical way around the problem. Our base agree-

[27] United Nations Document, A/cN.4/99, pp. 28-29.

ments and good relations with the Philippines complicated and, indeed impeded any exercise of navigational "rights" in its claimed archipelagic waters. Thus, in the long term, a de facto pattern of acquiescence could be foreseen. Furthermore, it was considered that it would be extremely difficult to entirely dismiss the logic of their arguments in the context of an international conference.

Actually, the situation was similar to the territorial sea problem. By the late 1960s international diplomatic and political realities were such that the question was not how to stop these claims but rather, how to influence their ultimate character. The challenge at this point was to identify a mutually satisfactory method that would preserve historic navigational rights in the critical routes of passage (meaning key straits and their approaches), so as to open the door to some form of compromise.

As a member of a U.S. delegation, I visited Jakarta in the summer of 1969 to participate in exploratory law of the sea discussions with Indonesian representatives. During the talks the delegation adhered to the long standing U.S. legal position that there was no current basis in international law for an archipelagic claim. The question was raised informally, however, as to whether Indonesia, in the context of a widely accepted international regime, would acknowledge the need to preserve the international right of warship navigation and overflight through important straits and sea lanes in their region of interest.

If there is one nation that deserves credit for translating this concept from an example of outrageous unilateralism to a generally recognized legal concept, subject to certain residual international rights, it is Indonesia. Through an extremely well-conceived and executed diplomatic offensive over the last quarter of a century, Indonesia built an ever-widening base of support. In a series of border negotiations, Indonesia was able to obtain de facto recognition of its claim by the surrounding states. Working closely with other island states, such as Mauritius, Bahamas, Fiji and the Philippines, Indonesia played a leading role in securing explicit recognition of the archipelagic concept in the 1982 Convention.

In my opinion, both the archipelagic and maritime states deserve credit for reaching agreement on a balanced approach at the UNCLOS III negotiations. Archipelagos are recognized within carefully described limits, as is the concomitant freedom of navigation and overflight in important archipelagic sealanes. The Convention provisions are, of course, only a blueprint. The determination as to whether anything positive has been accomplished in the long term will have to await the implementation phase.

As a collateral matter, it is of interest to note that one of the states of the United States—Hawaii—has more than a passing interest in the "law" of archipelagos. The neutrality Decrees of the King of Hawaii issued in May 1854, and May 1877, claimed as within its jurisdiction all waters of " . . . all the Channel passing between and dividing said islands from island to island; and all ports, harbors, bays, gulfs, estuaries and

arms of the sea cut off by lines drawn from one headland to another."

It is, of course, beyond the scope of this paper, but I should observe in passing that emerging international law will clearly have a profound impact on Hawaii's unique position. In this regard, the archipelagic provisions of the 1982 Convention might serve not only as a guide for sorting out the respective rights and duties of interested nations, but also as a departure point in the further delimitation of the rights between the State of Hawaii and the federal government.

Outcome of UNCLOS III

As mentioned, the U.N. General Assembly voted overwhelmingly in 1970 for resolution calling for the convening of a Third U.N. Conference on the Law of the Sea (UNCLOS III). The U.S. Navy's negotiating goals developed in light of the resolution included the following:

- maintain freedom of navigation and overflight through straits and archipelagos
- establish maximum breadth of national sovereignty at 12 miles
- maintain right of innocent passage for warships in territorial seas
- avoid restrictions on historic high seas freedoms in all ocean areas beyond national sovereignty
- maintain reasonable national access to the resources of the seabed in all ocean areas beyond national jurisdiction

Formulation of the negotiating goals was relatively simple. The difficult part was to develop negotiable formulations that fulfilled these goals but, at the same time, addressed the concerns and interests of other nations. As the negotiations proceeded, ambiguities on these critical issues crept into the text. Thus, toward the end, a fundamental question was raised: At what point is it better to live with no agreement than to operate under vague provisions that, in certain instances, do little more than preserve opposing positions. In the concluding section I shall discuss this problem and its implications for the orderly implementation of the navigational regimes contemplated by the 1982 Convention.

Straits and Archipelagos

With regard to navigation issues involving straits and archipelagos, the interesting thing about the final UNCLOS III text is how closely it mirrors ongoing state practices. Certainly, the Navy would have preferred the "high seas corridor" approach to international straits in order to clearly characterize navigational and concomitant jurisdictional rights in these critical areas. Diplomatic realities, however, forced the United States to begin to move away from this position of legal clarity several years before the conference conducted its first negotiating session in Caracas.

Informal discussions with many nations during the 1968-1970 time

frame made it clear that the preferred US/USSR approach of retaining a high seas corridor through international straits would have been extremely difficult to successfully negotiate. It is significant to note, however, that the primary objection did not bring into question the fundamental right of navigation and overflight. Without intending to prejudice these fundamental rights, many coastal states considered "territorial" jurisdiction to be necessary to protect the special environmental, fishing and safety interests of the littoral states. In an effort to respond to these concerns, in 1971 the United States proposed the following provision which presupposed key straits would be overlapped by the regime of territorial seas:

> In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such strait, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.

The approach taken in the final text approved in 1982 is, I believe, entirely consistent with the 1971 language proposed by the United States. In distinction to the more limited right of innocent passage in territorial seas generally, the 1982 convention provides in article 38 that, "In straits . . . all ships and aircraft enjoy the right of transit passage, which shall not be impeded . . ." The article goes on to provide that, "Transit passage means the exercise . . . of freedom of navigation and overflight solely for the purpose of continuous and expeditous transit of the strait . . ." To ensure that the interests of the coastal state are protected, Article 39 provides that ships and aircraft, while exercising this right, shall refrain from any threat or use of force against the states bordering the strait and shall generally refrain from any other activities other than those incident to their "normal modes" of transit.

Legal writers have raised the question as to whether these provisions recognize the right of submerged navigation through straits. From the perspective of the United States, at least, the phrases "freedom of navigation" and "normal mode" clearly indicate that such a right does exist. The intention was to recognize that the high seas right of navigation was incorporated into the regime of straits, notwithstanding the fact such straits were entirely overlapped by territorial seas. There was no deception in this regard. To my knowledge, all delegations understood that the United States and other maritime powers would attach this meaning to these provisions. In the final analysis, perhaps the most compelling argument for this interpretation is that it accurately reflects the long-standing practice of virtually all maritime states.

A similar approach was taken in the case of archipelagos. The final text provides for the right of "archipelagic sea lane" passage that, as a practical matter, is identical to the right of "transit passage" in straits. Article 53 provides that all ships and aircraft may employ the right of "archipelagic sea lanes passage" which means "the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit . . ." As in the case of straits, the approach taken is reflective of ongoing maritime practice.

The concomitant element of the 1982 Convention, of course, is explicit recognition of the right of coastal states to claim territorial seas up to a breadth of 12 miles and the right of certain island nations to establish straight baselines enclosing their claimed archipelago.

Breadth of the Territorial Sea

As mentioned previously, it was the continued proliferation of broad territorial sea claims that propelled the United States toward the negotiating table for the third time in 15 years. As it turned out, there was overwhelming agreement from the outset of the UNCLOS III negotiations that the maximum territorial sea limit should be 12 miles.

It will be recalled that the 1956 report of the International Law Commission, with the supporting vote of the U.S member, concluded that a state may lawfully claim a territorial sea up to 12 miles. There is little evidence, however, that the ILC considered the potential impact of such claims on vital navigational rights in international straits and on fundamental issues of neutrality and belligerency. Although it was clearly understood that their report dealt solely with peacetime issues, the ILC report begs the question of what impact such a newly recognized regime would have on the rights and duties of nations involved in armed conflict on the one hand and those that choose to remain uninvolved on the other.

It is not unreasonable to assume therefore, that this prestigious group considered these rights and duties would be left functionally undisturbed by the broader territorial sea claims. In other words, the Commission implicitly proceeded on the basis of a legal hypothesis that the internationally agreed attributes of a 3-mile territorial sea do not, *ipso facto*, carry over to a 12-mile claim. A hypothesis I believe to be historically, legally, and practically sound.

In any event—and this can not be emphasized too strongly—this viewpoint was a fundamental premise that underlay the Navy's willingness to recognize 12-mile claims. Numerous internal discussions to which I was privy, proceeded on the assumption that the United States was legally bound to recognize such claims only to the extent historic peacetime and wartime rights were reasonably accomodated by the state asserting the claim. Take, for example, the closure of a territorial sea as an assertion of a neutral right. Under appropriate circumstances,

assertion of such a right makes sense for a state with a 3-mile territorial sea, and of course, is recognized as a lawful measure by the 1907 Hague conventions. On the other hand, application of the same rule by a state with a 12-mile territorial sea, if the impact were to close a key international strait to belligerents, makes no sense at all.

As emphasized by the International Court of Justice in the Norwegian Fisheries case:

> The delimitation of sea areas has always had an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.[28]

Where straits are involved, the approach taken by the United States *vis à vis* the Panama Canal in the course of the First World War would appear, in the absence of agreement to the contrary, to reflect a reasonable and appropriate response. Notwithstanding its neutral status a U.S. proclamation in 1914 made provision for the use of the canal and its approaches by the warships of belligerents as well as prizes of war. No restriction was placed on the passage of merchant ships of any nationality carrying contraband of war. Of course, once the United States entered the war, it prohibited the use of the Canal by all ships of the enemy or its allies.

I believe that such an approach would be entirely consistent with several centuries of maritime precedent and practice that has sought to maintain an equitable and practical balance between the rights and duties of maritime and coastal nations in wartime as well as peacetime. In either circumstance, no state may unilaterally impose constraints that unreasonably upset this balance.

The President's statement of March 10, 1983 must be read in this light. In this regard he stated:

> The United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.[29]

Innocent Passage of Warships

The issue as to whether warships were entitled to the right of innocent passage in territorial seas, was a topic of intense debate at the 1958

[28] International Court of Justice, *Reports of Judgments, 1951* (The Hague) p. 132.

[29] The White House, Office of the Press Secretary, March 10, 1983.

Conference. Although the language of the 1958 convention on the territorial sea seems to give "all ships" this right, the negotiating record makes it abundantly clear that the delegates to the 1958 conference were unable to reach a meeting of minds on this seemingly intractable question.

Many of the competing arguments raised in 1958 were again aired in the course of UNCLOS III negotiations. As one of those involved in the climactic maneuvering on this sensitive issue at the last negotiating session of the conference, I can attest to the vigor of the debate. Several amendments which would have required prior notification and authorization for the entry of warships into foreign territorial seas were vigorously pursued, literally up to the last minute. When it became clear that the United States and a significant number of other nations were firmly opposed, and, if the issue were pressed further, it would come to a vote—the amendments were withdrawn. The president of the conference read from the chair a statement by the sponsors of the amendments to the effect that the withdrawal should not be viewed as acquiescence on the issue. It is nonetheless fair to state parenthetically—had the issue come to a vote, the proposed amendments would have failed. Had it been otherwise, it is doubtful the proposals would have been withdrawn.

The fact also remains that the 1982 text as it now stands, supports the conclusion that warships do possess the right of innocent passage—otherwise, all the jousting over the amendments would have been unnecessary. Several of the proscriptions in Article 19 relating to the exercise of innocent passage, clearly deal with activities connected with the operation of warships. As, for example, the exercise or practice with weapons and the launching, landing or taking on board of aircraft.

As a postscript, in an unpublished comment, the president of the conference, Ambassador Koh stated at the Duke University Symposium on Law of the Sea, October 30, 1982:

> Dr. Pardo (during his address the previous evening) said, amongst other things, that the Convention is not clear on the rights of warships to enjoy the regime of innocent passage through the territorial sea of coastal states. With all due respect to Dr. Pardo, I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea and there is no need for warships to acquire the prior consent or even notification of the coastal state.

Two additional facts are perhaps more compelling evidence of the present state of international law on this issue than is the above cited negotiated history and related rhetoric. First, U.S. warships and those of other maritime nations have exercised this right for years without significant objection from coastal states. And secondly, the Soviet Union, a long standing arch opponent of the principle, recently amended its national laws to recognize explicitly the right of innocent passage of foreign warships in its territorial seas.

Navigational Rights in Areas Beyond National Sovereignty

The 1982 Convention divides ocean areas beyond national sovereignty into two regimes—the traditional high seas and the exclusive economic zone (EEZ) which extends 200 miles from the baseline from which the territorial sea is measured. The EEZ is characterized as an area beyond national sovereignty because coastal state jurisdiction and control is limited to the resources of the area—not the area itself. If this were not the case, there would have been little point in limiting the territorial sea to 12 miles.

The fact remains, failure of the Convention to characterize the EEZ as high seas created an unfortunate ambiguity. The conference delegates gleefully indulged in a diplomatic "cop out" pointing out that the area had to be viewed *sui generis* that is, unique under emerging international law. It was somehow to be distinguished from territorial seas on one hand, and high seas on the other. My personal conviction is that the bottom line in all of this, was the desire of some coastal state delegations to leave open the argument that national claims to sovereignty out to 200 miles were valid.

- Article 58 of the 1982 Convention provides, *inter alia:*
  In the exclusive economic zone, all States . . . enjoy . . . the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms . . .
- Article 87 provides, *inter alia*,
  The high seas are open to all states...Freedom of the high seas . . . comprises, *inter alia*, both for coastal and land-locked States:
  a. freedom of navigation
  b. freedom of overflight
  c. freedom to lay submarine cables and pipelines . . .
  d. freedom to construct artificial islands and other installations. . . .
  e. freedom of fishing
  f. freedom of scientific research

These freedoms, of course, must be exercised with due regard for the interests of other States in their exercise of the freedoms of the high seas. In so providing, the convention simply reiterates a principle well grounded in customary law of the sea.

As far as freedom of navigation is concerned, it can be seen that there is no material difference between the regime of the high seas and the EEZ. The only difference in the latter case pertains to limitations on the freedom of scientific research and resource extraction activities which are placed under the control of the coastal state. As the language

of the convention is constructed, freedom of navigation in these areas comprehends the continuation of the freedom to conduct a wide range of military activities such as training exercises, normal deployments, intelligence collection, surveillance, ship and aircraft maneuvers, oceanographic surveys and routine fleet movements for national security purposes. All such activities, of course, must be undertaken with due regard to rights of other users.

When discussing military activities in connection with law of the sea, it is important to keep in mind that it was clearly understood by those who participated in the negotiations, that legal issues relative to the deployment or use of naval forces as an extraordinary measure of self-defense was beyond the scope of the 1982 Convention.

National Access to Deep Seabed Resources

It will be recalled that the Navy's primary interest in this issue was one of principle. As a practical matter, any deep ocean mining operation in the near or mid-term was considered to be extremely unlikely because of the huge costs involved, and projections that new technologies would have a significant impact on the identifiable mineral requirements of the United States and other industrialized nations. Nonetheless, retention of a reasonable right of national access to such resources was considered to be a logical and essential attribute to the fundamental principle that the seas are open to all nations.

As a practical matter, it appeared then as it does today, that there is a vast and ever-growing supply of deep ocean nodules. Thus, a mining activity by one nation or group of nations would not exclude others—in other words, there are sufficient nodules for all who wish to exploit them. It is, perhaps easier to place nodules in an "inexhaustible resource" category—making them clearly exploitable as a reasonable exercise of a freedom of the seas—than it is to place fish in such a category. As an exercise of a freedom of the high seas, however, a miner could claim superior rights in a mine site only to the extent it was being worked. Rights to the site would vest by virtue of "occupation"; rights to the nodules would vest by virtue of "possession." In this sense, it would be as illegal to interfere with an ongoing mining operation, as it would be to interfere with a high seas fishing activity.

Because of the locational nature of nodule mining activities, many U.S. industry representatives considered that some form of international registry was warranted. Such a system was the primary ingredient of the U.S. proposal until 1976. At that time Dr. Kissinger, then Secretary of State, proposed the "parallel" system by which individual nations and the international community, through a UN mining enterprise, would have equal access to mine sites. The final text of the convention generally reflects this approach. It goes on to provide, however, that after a certain period of operation, the "rules of the game" could be changed, if universal agreement was possible, by a three-fourths vote of parties to the Con-

vention. This, among other aspects of the regime, was fundamentally unacceptable to the United States because it raised the possibility of a preemptive removal of our national access.

I believe it serves little purpose to dwell on the problems and potentials of the rather intricate deep ocean nodule mining regime contained in the 1982 Convention. Certainly at present, the issue is academic. If my prediction is correct that new technology will radically change the entire field of metallurgy, including the relative cost and composition of strategic alloys, this portion of the Convention will, in the final analysis, probably assume an international relevance comparable to that of the 1902 Balloon Convention.

The "Package Deal"

After a marathon negotiating effort over a period of 10 years, it is understandable that many nations greeted the last minute decision of the United States not to sign the 1982 Convention with a degree of consternation. As it was clear the U.S. objections were directed to only one portion of the Convention text—deep seabed mining—a feeling was generated that the United States intended to "pick and choose" the good and the bad out of the Convention. This was considered to be a violation of the spirit and intent of the "package deal," a concept which was considered by many to be fundamental to the negotiations.

Ambassador Koh, the President of UNCLOS III accurately summarized these views, when he stated at the closing session:

> The second theme which emerged from the statements (of many delegations) is that the provisions of the Convention are closely interrelated and form an integral package. Thus it was not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations.

At the initial negotiating session in 1974, the conference adopted rules of procedure which included a so-called "gentleman's agreement." Designed to ameliorate the tyranny of the majority, it provided:

> The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.

This agreement, of course, caused even the agreed text to remain open ended—including the navigational portions that had been fully negotiated by 1977. Thus, in a negotiating context, it is true that the entire convention could be properly viewed as a "package deal." In a way, the gentleman's agreement served its purpose, as there was no vote on substantive matters until the very end of the Conference. Various imaginative devises were employed to keep the negotiations moving and avoid deadlocks: frequent informal negotiating sessions, the formation of informal groups of like-minded states, numerous inter-sessional meetings, the use of informal drafting groups and plain old fashioned horse trading in the corridors.

The "package deal" approach was not unique to this Conference. Indeed, for better or worse, virtually all international negotiations proceed along the lines of an "all or nothing" approach. What was perhaps unique to this conference, was the large number of broad-based institutionalized "give and take" arrangements, procedures and forums. This approach to treaty making, however, carries a significant price tag—it is difficult if not impossible to determine the level of true international support for any particular article based on its own merits. Thus, even if the Convention were to be ratified by all nations, prior to the implementation of an article through an established pattern of state practice, in practical terms, its viability must be subject to some question.

There is, however, a vast difference as to how a treaty is negotiated and how it is implemented. The "package deal" has an entirely different meaning in each instance. As emphasized, while a treaty is being negotiated, entirely unrelated sections and articles can be, and frequently are, used for trading purposes. This was certainly the case at UNCLOS III.

On the other hand, during the implementation phase it makes sense to link only provisions that are functionally related. For example, the provisions establishing the archipelago concept are functionally related to those that deal with archipelagic sealane passage. Both must be implemented simultaneously to maintain a balanced maritime regime. Orderly implementation of the regimes contemplated by the 1982 convention can be accomplished only if the "package deal" is seen in this light. The non seabed portions of the 1982 Convention should be viewed as containing a discrete number of "packages" each with its own temporal, as well as substantive and procedural issues that can be effectively dealt with only as separate initiatives.

During the course of the law of the sea negotiations U.S. representatives frequently made the point that functional linkage was the key to the development and implementation of a stable international maritime regime. For example, in its report of the second session, the U.S. delegation stated:

> The idea of a territorial sea of 12 miles and exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of the States participating in the Conference . . . Acceptance of this idea is of course dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation, (and) the outermost limit of the continental shelf . . .

The U.S. delegation report of the third session included the following observation:

> Negotiation of a balance of rights and duties in the 200-mile economic zone is one of the most important elements of a satisfactory package, . . . a substantial consensus continues on a territorial sea of 12-miles. There appears to be a strong trend in favor of unimpeded passage of straits used for international navigation as part of a Committee II package.

The impact of the package deal has frequently been raised in connection with the decision of the United States not to sign the convention. Generally speaking, whether or not the convention were viewed as a package deal, the United States as a non-party could not assert any new rights created thereunder. On the other hand, to the extent the Convention articulates customary law, continued enjoyment of such rights should not be viewed an assertion "under the Convention" in violation of the package deal.

In any event, it is to be hoped that such a collateral issue not stand in the way of fair and balanced implementation of the navigational provisions and that it will not be used to link them, in a post negotiation context, to the functionally extraneous deep seabed mining issues.

Where Are We? Where Are We Going?

A distinguished international law scholar, Myres McDougal observed in 1966:

> I think it may take a hundred years for the law of the sea to recover from the last two international conferences (1958 and 1960) which dealt with it (special fisheries zones) and I would regard the immediate call of another conference as an unmitigated disaster.

Was he right? It's a close call, but I believe on balance, the 1982 Convention can serve as an effective blueprint for the progressive development of customary law of the sea in the next 20 years.

Unless one keeps in mind the inherent limitations of the multilateral treaty-making process, it is easy to be disappointed with the outcome of UNCLOS III. The truth is, nations are rarely willing or able (because of domestic political constraints) to explicitly resolve fundamental security or economic issues through the treaty process. Frequently states are willing to acquiesce to certain international practices (the maritime environment is a prime example) but at the same time, are unwilling to agree to their explicit codification. In this light, the ambiguities in the navigational portions of the Convention should not be a source of surprise or alarm.

It is totally unrealistic to think that a U.N. sponsored multilateral conference such as UNCLOS III could be negotiated like the WW II peace settlements. Anything resembling unconditional surrender under the auspices of the U.N. is out of the question. Only where genuine consensus exists on a discrete issue can such a treaty be explicit. Under the prevailing circumstances and considering the agreed rules of procedure including the "gentleman's agreement," there was no choice but to negotiate UNCLOS III essentially from a "no win—no lose" standpoint. This meant that controversial issues had to be laced with sufficient ambiguity to ensure that interested nations retained adequate wiggle room.

It follows that all the United States could reasonably expect from the conference was to:

- avoid any explicit repudiation of the navigational practices it had come to rely on for economic and national security purposes.
- lay the foundation for the reconciliation of the "access" interests of the maritime community and the "competence" interests of the coastal states—what I call the blueprint function.

From this perspective, I believe the Conference was successful. What this means, however, is that UNCLOS III was only the beginning of a continuing process. The biggest challenge lies ahead. That is, to ensure that customary law remains consistent with our interpretation of the "blueprint," through a dynamic program of persuasion and demonstration.

As has been pointed out, historically there was a clear division in the ocean milieu between access rights on one hand, and jurisdictional or competence rights on the other. The former accrued on the high seas and the latter accrued in a narrow band of coastal waters, termed territorial seas. This sharp distinction was blurred, however, particularly after World War II, by various functional claims over fisheries and the resources of the continental shelf.

Consistent with this accelerating trend, what emerged from UNCLOS III was a rather detailed codification of the concept of shared maritime access and coastal state competence in the same maritime regime. It is no longer accurate to conclude that maritime nations have full, unregulated access rights to ocean regimes off foreign shores. But, in a similar vein, it is equally important to recognize that coastal states do not possess full jurisdictional competence in such regimes. Thus, under emerging international law, the juridical status of maritime regimes is subject to some qualification. Nonetheless, it is generally accurate to think of waters beyond the 12-mile territorial seas as "international" in character, and the internal, territorial and archipelagic waters as essentially "national" in character.

Because of the approach taken, it is not surprising that the exclusive economic zone—not having the full characteristics of the regime of high seas—was viewed as *sui generis*. Likewise, the portion of territorial seas

that overlap international straits and the portion of archipelagic waters that comprise sea lanes, should be viewed as having a special jurisdictional status, having many of the characteristics of an international regime. The view that international waterways possess a unique jurisdictional status is not of recent origin. In the S.S. Wimbledon case, decided by the Permanent Court of International Justice in August, 1923, the court stated:

> . . . the use of the great international waterways, whether by belligerent men-of-war, or by belligerent or neutral merchant ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian sovereign.

Speaking of the Panama and Kiel canals, the court went on to say:

> Moreover they (the canals) are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.

After the negotiating dust settled, it is fair to say that significant agreement was reached at UNCLOS III (with varying levels of support for any particular item) on the existence, in principle, of the following navigational rights:

- The right of innocent passage for all ships, including warships in territorial seas generally.
- The freedom of navigation for all ships, including warships, and the freedom of overflight for all aircraft, including military aircraft, on, under and over international waters overlapped by territorial seas and in archipelagic sea lanes.
- All high seas freedoms in areas beyond the 12-mile territorial sea, subject to explicit exclusions such as exploitative activities or scientific research in the exclusive economic zone.

Some writers maintain that the freedom to navigate through international straits, termed "transit passage" in the 1982 Convention, is a new and unique right. This conclusion is based on two premises, both of which are wrong.

The first premise, is that the rule applicable to international straits codified in the 1958 territorial sea convention is, *ipso facto*, applicable to straits overlapped by 12-mile territorial sea claims. The 1958 rule was agreed to, however at a time when the United States and a significant number of other nations considered the maximum legal territorial sea breadth to be 3 miles. In view of the overwhelming impact of a 12-mile claim (as opposed to a 3-mile claim) on historic navigational rights in straits, absent explicit agreement to the contrary, the 1958 rule can be logically viewed as having had application only to straits less than 6 miles wide.

The second premise is that there is insufficient maritime practice to support the existence of a customary right similar to "transit passage." There seems to be a natural tendency to assume that it is impossible for a legal right to exist in the absence of its articulation in an international convention. The fact is, the concept of transit passage as codified in the 1982 Convention mirrors, in all essential respects, long standing maritime practice in international straits. Over a period of several decades key coastal states (including those bordering straits less than 6 miles wide) have acquiesced in both submerged navigation and overflight. In this regard, the point has been made that customary law could not develop with respect to submerged navigation because the coastal state would be unaware of such transits. As one senior official of a littoral state put it, however, "Unless one believes in levitation, the conclusion is inescapable that submerged transits have taken place in international straits with a high degree of frequency."

Although legal interpretative arguments are important, it is also important to recognize certain realities. It is simply unrealistic, and perhaps counterproductive, to interpret the 1982 Convention, or any other treaty for that matter, in a way that prejudices the vital interests of a state. This is not intended to sound gunboatish. But as Professor McDougal has often pointed out, international law has no purpose other than to serve the individual and shared needs of the state.

As a practical matter, it makes little sense to maintain that the United States or any other maritime state should cease to exercise its rights in international straits, absent a showing that such needs are not compelling and that the vital interests of the littoral states are thereby prejudiced. The fact that the practice has gone on for decades without significant controversy, and the fact that the 1982 Convention provides for such a right in straits, is ample evidence that this is not the case.

In 1983 the President issued an important statement concerning the maritime policy of the United States He stated:

> . . . the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high sea uses.

This posture was not generated by the decision of the United States not to sign the Convention. In 1979, well before the decision was made, the head of the U.S. delegation to the Conference, Ambassador Richardson stated:

> Activities in the oceans by the United States are fully in keeping with its long standing policy and international law, which recognizes that rights which are not consistently maintained will be ultimately lost.

Scholars, politicians and diplomats have dwelt long enough on the issue of signature and ratification of the 1982 Convention. It is time to change the focus to the real issue of implementation. There are practical maritime problems that arise every day that must be solved. The non-seabed mining provisions of the Convention strike a workable balance of rights between coastal and maritime state interests. A concerted practice of states consistent with that blueprint is what is needed to maintain stability in the ocean environment.

Unless and until the Convention is fairly and effectively implemented, it is not worth the paper it is written on to the people who are most affected—the navigator, the fisherman, the merchant mariner, and the commanding officer of a warship. In the final analysis, is there any non-confrontational alternative to the utilization of the 1982 Convention? I think not. Let's recognize it for what it is: far from perfect, but the best codification of the law of the sea that is presently available. Whether the Convention ever "comes into force" as a matter of international law is not particularly important. Regardless, it's worth a try to make it work for everyone.

The McKernan Lectures

This lecture series was created to honor the memory of Donald L. McKernan, who died in Beijing, May 9, 1979, while participating in a U.S. trade delegation. Professor McKernan's last job was that of director of the Institute for Marine Studies, University of Washington. Before that, he had several distinguished careers—as fishery scientist, fisheries administrator, director of the Bureau of Commercial Fisheries, and special assistant to the Secretary of State for fisheries and wildlife in the U.S. Department of State.

Professor McKernan's interests encompassed the entire range of marine policy studies, and this lecture series, as reflected by the following titles, has been designed to incorporate the same breadth of interests.

Fisheries

Pacific Salmon
Scenarios for the Future
by Peter Larkin

Extended National Fisheries Jurisdiction
Palliative or Panacea?
by Roy I. Jackson

Law of the Sea

Should We Cut Our LOSes?
U.S. Foreign Policy and International Regimes
by Joseph S. Nye

From Cooperation to Conflict
The Soviet Union and the United States at the Third U.N. Conference on the Law of the Sea
by Bernard H. Oxman

Mission Impossible?
Preservation of U.S. Maritime Freedoms
by Bruce Harlow

Ocean Policy

Balancing Unknowns
A Decade of Controversy About Developing the Outer Continental Shelf
by H. William Menard

Whither U.S. Ocean Policy?
by Ann L. Hollick

Marine Transportation

Neither Guns Nor Butter
A Look at National Maritime Policies
by Henry S. Marcus

Restrictive Shipping Practices
Boom or Blight for Developing Countries?
by Ernst G. Frankel

International Programs

Science & Politics
International Atmospheric and Oceanic Programs[1]
Robert M. White

These publications may be ordered from Washington Sea Grant Communications, University of Washington, Seattle, WA 98195.
Price $3.00 (includes handling and postage fees).
Washington State residents, please add applicable sales tax.

[1] Single copies of this reprint from the *Bulletin of the American Meteorological Society* are distributed free by Washington Sea Grant Communications.

Bruce Harlow, Rear Admiral USN (ret) served from 1981 to 1983 as the Department of Defense and Joint Chiefs of Staff Representative for Ocean Policy Affairs. During that period he was appointed Vice Chairman of the U.S. delegation to the Third U.N. Conference on the Law of the Sea (UNCLOS III). In this capacity, he played a key role in uniting the Western maritime nations in opposing compromise on navigation and overflight provisions of the LOS treaty.

Earlier, Harlow held positions as Force Judge Advocate for the U.S. Pacific forces and as Assistant Judge Advocate General and Deputy Commander for the Navy Legal Services Command. There he developed and coordinated U.S. policy and legal positions with respect to maritime and military concerns.

He currently is a consultant to the U.S. Air Force in international law, and he lectures at the Naval War College on Law of the Sea and Law of War issues.

WSG 85-5
Price $3.00