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UNCLOS III AND THE UNITED STATES

At the tenth session of the 'Third UN Covention on Law of the Sea' former UN Secretary General Dr. Kurt Waldheim expressed concern that 'The nations of the world can not sensibiy or safely face the future without a regime of law and order for the Sea[1]. Such a regime was expected to be materialised at this Convention which came to its final shape in April 1981 in New York and opened for signature in December 10, 1982 at Montego Bay. While most of the governments and observers enthusiastically welcomed the Convention, the final phases of UNCLOS III faced some disappointments as a result of the former Reagan administration's decision to reject the document which the sucecssive U.S. govern ment had helped to create. Nevertheless, the Third World countries were resolute enough and on the very day the Convention was opened for signature, a record number of 119 states had signed the document. The United States refused to sign the Convention because of certain reservations by the Reagan administration. The United States under Reagan adopted an Ocean Policy of their own on 10 March 1983.

The quest for an effective Ocean order had begun long ago, but it is only in recent times, particularly after 1945 that the institutionalized articulation for such an order became stronger. Oceans

1. Surya P. Sharma, 'Law of the Sea : Prospects for the U.N. Conference', *World Focus*, No. 19, July, 1981, p. 3.

had alwys been the arena of contention among nations and the traditional naval rivalry in recent times have been intensified by ideological conflicts the world over. The diversity of interest between the developed and developing nations over ocean space has created a world wide ocean disorder. With a view to establish a stable ocean order, United Nations convened the first Conference on Law of the Sea (UNCLOS I) in 1958. But it failed to establish the outer limit of territorial Sea. Nevertheless, it codified some important customary law relating to innocent passage, recognition of coastal states sovereignty over territorial sea, freedom of high seas etc. At UNCLOS II in 1960, another attempt was made to reach an agreement as to the outer limit of territorial sea and the 'fisheries zone' on the basis of a formula which provided for a territorial sea of 6 miles plus an additional 6 miles 'fisheries zone'; but it also failed due to diversity of state practice that varied from 3 to 200 mile limit.

Following the successive failure of the two Conventions, a vaccum was created as there was neither any agreement as to the outer limit of national jurisdiction over ocean space, nor the legal regime beyond national boundary. Moreover, the rapid development of science and technology, along with the proliferation of newly independent nations warranted a reformulation of the law of the sea. Thus, UNCLOS III was convened in 1973, which after long exercise of nearly a decade came to its final shape in 1981. But the future of the UNCLOS III became uncertain because of the widening gap between the North and South. The South achieved its victory of the concept of 'Common Heritage of Mankind', whereas the United States adhered to its policy of 'Free Enterprise'. Althugh United States admittted that the concept of 'Common Heritage' would benefit all states, specially the poor, it cautioned that the concept must not materialize at the cost of unduly restricting access to seabed resources. Therefore, the US took refuge to two principles to justify their understanding of freedom of the sea : (1) *Mare Liberum*, as to which, "the sea can in no way became the private property of any one

because it not only allows but enjoins its common use", and (2) *Res Nullius*, i.e. "resources do not belong to any one but are the property of the first party that can possess them". Although the United States had several reservations, the issues relating to seabed resources and the exploitation concerned them most and they could make no concession in this regard.

Although all the Third World states, including Soviet bloc, signed the Convention, they, nevertheless, felt disappointed because they do not possess the required technology and finance to implement the provisions. On the other hand, a segment of the US policy makers feared that US refusal to sign the Convention would be costly for the country. Therefore, the Law of the Sea finally faced the problem of the lack of universality, particularly in the absence of a great power like the US. This was not a welcoming development at all. Question naturally arose as to what would be the position of the future ocean regime. In this paper an attempt has been made to focus on the achievement of UNCLOS III, reasons behind the US refusal to sign the Convention, the areas of conflict between the US National Ocean Policy and UNCLOS III, to what extent they will work, whether they will be marked by conflict or cooperation, the widening gap between the North and the South and some suggestions as to how a viable Seabed Authority can be worked out.

I

UNCLOS III: Its Characteristics and Major Achievements.

During the years of negotiation (1974-1982) the UNCLOS III adopted certain working principles; (1) the idea of a package deal i.e., the Convention was to be regarded as a whole in order to encourage a spirit of give and take; (2) the notion of consensus which encouraged progress in the talk by avoiding deadlocks; (3) the notion of 'gentleman's agreement' that voting would, nevertheless, take place as the last resort, if consensus breaks down, which helped

governments put their trust in the consensus principle.[2] These three principles interacted effectively and produced the spirit of give and take. The Convention regarded as a great achievement consists of a preamble, seventeen parts, 320 articles and nine Annexes, with a volume of 194 pages.

The major achievements of UNCLOS III can be summarized as follows.[3] (1) It established the territorial sea of 12 miles distance from base line over which the coastal state shall have complete sovereignty, with provision of innocent passage by foreign vessels; (2) It created the concept of 'Transit Passage' for international straits, with the right to passage for warship, submarine and overflight for aircraft; (3) It legitimized the concept of 'Archipelagic Water' with the right of island nations to exercise certain authorities, as is necessary for the preservation of peace; (4) It introduced the concept of 200-mile 'Exclusive Economic Zone' (EEZ), where coastal states shall have exclusive authority to manage the living and non-living resources, but retain the "High Sea's" status. Landlocked and geographically disadvantaged states shall have certain fishing rights; (5) It established the continental shelf for coastal states up to 200 miles and in some cases 350 miles or beyond, but the legal status of superjacent water and air space above would not be affected; (6) High seas' freedom was confirmed, but subject to rights granted concerning scientific research and the construction of artificial islands. It was also agreed that states should cooperate in the conservation and management of living resources of the high seas; (7) The "Area" and resources outside national jurisdiction is declared as the 'Common Heritage' of mankind and activities there shall be carried out for healthy development of world economy, balanced growth of international trade and promotion of international cooperation for global development, particularly of the developing states. For the management of resources in this 'Area', an International Sea Bed Authority, with an executive organ named 'The Enterprise' and a

2. Ken Booth, 'Law, Force and Diplomacy At Sea' page-20.
3. *Ibid*, page 22.

comprehensive dispute settlement system for seabed problem would work; (8) The Convention established a comprehensive legal system for international maritime environment obliging all states to protect and preserve the marine environment and control pollution; (9) A broad system of marine scientific research for peaceful purposes is established obliging the parties to cooperate in the development and transfer of technological know-how of marine science; (10) The Convention created an obligation for states to promote the development and transfer of marine technology, while granting legitimate interests of the suppliers; (11) A comprehensive and binding system of dispute settlement has been made, obliging states to settle their disputes over the interpretation and application of the Convention peacefully. Thus the UNCLOS III tried to balance the rights and duties of state, reconcile their conflicting interests and adjust to the changing global political environment.

II

Reasons behind the US Non-Acceptance of the UNCLOS III

On 9 July 1982, President Reagan formally declared the US refusal to accept the Convention on Law of the Sea and on 10 March 1983 announced a new National Ocean Policy and established, by proclamation, a 200 nautical mile Exclusive Economic Zone for the United States.[4]

At the inital stages of UNCLOS III, US participation was primarily a consequence of immediate concern over expanding state claims to maritime jurisdiction as it threatens to restrict the traditional right of ocean commerce and the movement of naval forces. With the progress of the Conference, every aspect of ocean uses was included in its agenda and every issue was resolved in favour of the US except provisions relating to seabed. The deep

4. James. L. Malone, 'Who needs the Sea Treaty' *Foreign Policy*, 1984, page 44.

seabed mining which earlier did not receive much importance in US emerged as the prime consideration before the Reagan administration. It began to view the deep seabed mining as critical to national security and economy. This idea emerged from the scarcity of strategically important minerals like manganese and cobalt and the US did not want any restriction of its access to such minerals in seabed. Moreover, there was the possibility of not getting the consent of the Senate over the text of the Convention, as it was in 1981. Hence began a Review of US administrations' policy which looked for an answer to the question of 'whether US interests would be best protected under or in absence of a multilateral Convention'. President Reagan announced that 'United States remained committed to the multilateral treaty process for reaching agreement on Law of the Sea but at the same time remained equally committed to oppose any concessions that would jeopardise or compromise the country's security or economic well-being.[5] There were two objectives underlying the Review discussion by the US government; (1) to reshape, with the cooperation of those countries sharing US interest in the deep seabed mining, the relevant provision of the treaty so that it would neither deter the development of the ocean's mineral resources nor restrict the ability to meet national and global demand;[6] (2) to establish in the treaty a decision-making system within the International Seabed Authority and its Executive Council that would fairly reflect and protect the political and economic interests and financial contributions of member states.[7]

There were two views that emerged in the Review process. The first view advocated by the Deputy Assistant Secretary of State for Ocean and Fisheries Affairs held the treaty as flawed, because it created adverse precedents for other negotiations on economic

5. James L. Malone, 'Who needs the Sea Treaty', *Foreign Policy*, Vol. 54, 1984, page 51.
6. *Ibid*, page 53.
7. *Ibid.*

issues between the developed and developing nations-the North-South dialogue-subjugated American industry to an international regulatory and management system, and was incompatible with President Reagan's apparent desire to return the United States to a period of power and influence in world affairs in which its policies would simply be enunciated rather than sold to other through a process of diplomacy and negotiation.[8] The opposite view, though recognized that the treaty in its present form was unratifiable, believed that there was scope of improving the treaty through negotiation. The latter view prevailed and US President announced on January 29, 1982 that United States would return to the negotiation and would seek six broad objectives, as summarised by James L. Melons.[9]

The United States can not consent to provisions that:

(1) would enable a future review conference to adopt binding changes to the treaty over the objection of member states, thus denying to the US Senate its constitutionally mandated role in the treaty process;

(2) would intentionally deter rather than promote economic development through the establishment of an ostensible "parallel system" that would, if implemented, discriminate against private operations, thereby restricting US access to minerals of strategic importance ;

(3) would create a bias against the production of mineral resources as set forth in Article 150 of the Convention (policies relating to the management of area beyond national jurisdiction);

(4) would impose unconscionable and regulatory burden on American industry and government, requiring by the best estimates of US government officials, a potential liability for the US of $ 1 billion in direct costs and loan guarantee for both initial expenses

8. Leigh S. Ratiner, 'The Law of the Sea : Cross road for American Foreign Policy', *Foreign Affaris*, 1982, page 1008.
9. James Molone, 'Who needs the Sea Treaty', *Foreign Policy*, p. 46, Vol. 54.

and continuing operation of the 'Enterprise' and the International Seabed Authority' itself ;

(5) would enjoin the mandatory transfer of private and possibly sensitive technology to an International Seabed Authority dominated by developing and Warsaw Pact countries as the price of its use in private mining operation; and

(6) would establish a potential source of funding for the terrorist activities of national liberation organisations.

In connection with the Review process, it is important to note that the Reagan Policy changed two things in the Department of Defense (1) emphasis on importance of American access to strategic raw materials as a national security interest and (2) the belief that if the treaty finally entered into force without US participation, most of those provisions which were favourable to security interests of the United States would be acceptable as customary international law and that treaty rights would be available to all states whether or not they became parties to the treaty.[10]

Although a lot of discussion occured within and outside the United Nations for about one year, the Conference failed to meet any of the US delegations six basic objectives. Therefore, following the failure of having met the six basic objectives of the US government, together with the changed view of the Department of Defense, the US could not accept the Convention.

III

Military Dimension of UNCIOS III

Although the naval dimension of the changing law of sea was generally neglected in the Public UN forum, the subject received appropriate attention from naval establishment and particularly those of the traditional naval powers. It is very interesting to note

10. Leigh S. Ratiner, "Law of the Sea : Crossroad for American Foreign Policy" *Foreign Affairs*—Summer 1982. page 1011.

the transformation of interest areas of the developed nations from economic and social issues in the 1970s to security concern in the 1980s. For the industrial world immediate concern about national economic stability elbowed out ideas about a NIEO and traditional military anxieties rose to the top of many national agenda.[11]

Though it is true that naval strategy can not and will not depend on the legal regime of the sea, rather on threat perception, economic consideration and technological innovations; but a strategy in consistent with the law of the sea would allow naval strategy to operate more smoothly. Although national security consideration played a major role in US policy making throughout the UNCLOS negotiations the Reagan administration tried to justify it under the cover of Free Enterprise ideology. The rationale behind such a justification was based mainly on two points : (a) Reagan administration viewed the regime of security maintenance through larger access to strategic raw material ; and (b) most of the provision of the Convention which were favourable to the security of the US would be accepted as customary international law and, therefore, the treaty rights would be available to all states whether or not they become parties to the treaty.

US had five main naval interests during the negotiations : (1) limiting the expansion of the territorial sea; (2) maintaining passage through straits ; (3) maintaining passage through archipelagic seas; (4) maintenance of traditional rights in the area covered by the new EEZ ; and (5) the creation of a carefully blanced and compulsory system of dispute settlement.[12]

If we analyse the provision of the Convention, we can see that the UNCLOS III has fully met the interests of the naval powers and this was recognized by Commander Dennis R. Neutze, the legal adviser to the Deputy Chief of Naval Operation of the US Navy in 1983 that, "the Treaty process have resulted in a rather clear victory

11. Ken Booth, 'Low, Force and Diplomacy At Sea', page 7.
12. *Ibid*, pp 63-66.

for the proponents of naval mobility". The major achievements of UNCLOS III which have direct military significance including the 12 mile territorial sea with a right of innocent passage, transit passage in straits, costal states rights over living and non-living resources in the EEZ but retaining freedom of navigation and overflight for other states, the validation of the concept of archipelagic seas including the right of archipelagic sea-lanes passage for others, the confirmation of a comprehensive dispute settlement mechanism. According to Neutze this would have served the US Navy in the following ways :[13]

(1) slow the proliferation of excessive maritime claims.
(2) provide a legal yardstick against which the validity of claims can be judged.
(3) provide a more stable environment in which to plan and conduct future naval questions.
(4) permit the conduct of naval operations in most cases without the political costs that the US pay in exercising her navigational freedom. Therefore, the Convention was a legal endorsement of traditional expectations and practice regarding naval mobility.

Inspite of all those achievements, problem arose as to US objection of seabed issues and their security implications. Reagan's Foreign Policy Advisory Council and Strategic Minerals Task Force were worried about the concentration of enormous economic and political powers in the Seabed Authority which they feared would be dominated by the Third World nations.[14] Thus, the US thougt that her interests would be served better by not signing the Convention. But persons like Richardson who was the US representative to UNCLOS negotiation expressed that the Convention would benefit his country's strategic interest in providing an alternative source of nickle, copper, cobalt and manganese. "It

13. *Ibid*, page 73.
14. *Ibid*, page 126.

would be ironic if in the name of that same interest we handed over the exploitations of Seabed minerals to our industrial competitors.[15] Besides, another possibility was that seabed unilateralism could provoke a range of responses like sabotage, covert attacks and commodity or diplomatic boycott by some states. But no such prediction or apprehension came out as reality. Reagan adhered to his policy till the end and the US is conducting seabed mining indepedeat of the Seabed Authority, to the dissatisfaction of the proponents of the concept of Common Heritage of Mankind.". This was predicted by Henry Kissinger at an early stage of UNCLOS III that if there was no international regime the Navy would be well able to protect US mining compaines.[16]

IV

North-South Issues and UNCLOS III

By the fifth session of UNCLOS III the developing states reached a complete deadlock on the issue of deep seabed mining regime. The developed states specially the United States looked to it as the Freedom of the Sea "justifying it on the concept of *Res Nullies*; On the other hand, the developing states, the Group of 77 defined it as the 'Common heritage of Mankind' following the '*Res Communis* principle i.e. the deep sea belongs to everyone.

This division became more prominent when Arvid Pardo of Malta requested on August 17, 1967 before UN General Assembly that the seabed and ocean floor beyond national jurisdiction be called the 'Common Heritage of Mankind'. This was adopted by the General Assembly Resolution in 1967 and in 1968 a Seabed Committee was made to study the peaceful uses of the seabed and ocean floor beyond the limit of national Jurisdiction. In 1970 the General Assembly passed a Moratorium Resolution pledging states to refrain from (a) resource activities in the seabed beyond

15. *Ibid*, page 127.
16. *Ibid.*

national jurisdiction pending the establishment of an international regime and (b) claims of exclusive jurisdiction. Article 1 of the Declaration by the UN of the principle governing the ocean floor beyond the limit of national jurisdiction declared that the seabed and ocean floor and the subsoil thereof beyond the limit of national jurisdiction as well as the resources of the 'Area' are the 'Common Heritage of Mankind'.

Robert L. Friedheim summarised the key phrases in the Seabed debate till the 1970s as follows :[17]

South/Less Developed Countries' Preferences	North/Developed Countries' Preferences
1. Protect the right of Coastal states.	1. Protect freedom of the High Seas.
2. Protect the economies of developing states.	2. Protect fishing rights.
3. Protect exploitation of technologically advanced states.	3. Protect freedom of scientific research.
4. Prevent colonialism and imperialism.	4. Protect the right of all.
5. Close gap between developed and developing states.	5. Protect the access of all.
6. Strengthen ocean capabilities of developing states.	6. Protect maritime interest.
7. Taking into account special needs of developing states.	7. Take into account International law.
8. Rights of Sovereignty or exploitation not implied by scientific research.	8. Take into account UN Charter.
	9. Take into account existing treaties.

Source : Robert L. Friedheim, 'The Marine Comission's Deep Seabed Proposals—A Political Recommendation', 47th LOS Annual Institute Conference June 23-26, 1969, p-91.

17. Barkenbus, 'Deep Seabed Resources', page-162.

The Moratorium Resolution did not find favour with the US and after adoption of the Resolution, the US representative said that the objective of the Seabed Committee should not be to prohibit seabed exploitation and the development of seabed technology which would be self-defeating, but to ensure that such activities do not prejudice or otherwise make more difficult the solution of issues under consideration.[18]

Looking from US perspective her action was justified by the paucity of minerals faced by the country in the decade of the 1970s. US mineral problem consists of 3 dimension : (1) the diminishing stock of high grade mineral ore found within the US has led mining companies to search elsewhere which led to an uncomfortable degree of dependence upon foreign source;. Therefore, the abundance of manganese noodles in the seabed appeared to be a potential source, that could lessen such dependency ; (2) Sea bed resources are free of vulnerabilities unlike the oil supply; (3) the growing world wide trend of challenging attitude from mid 1960s as to the role of private mining companies, many based in USA, resulting in the diminishing role of those companies and causing unreliable supply of minerals to USA.

On the other hand, it is very interesting to note how the developing state, united on the basis of their shared interest forcefully articulated their demands. This newly-found power of the developing nations had significant impact at the UNCLOS III negotiations. In such a situation, the United States tried to make a division among the developing nations, between consumers and producers. But such an attempt proved a failure because the concept of 'Common Heritage' appeared to the developing world a noble cause, along with great promise. Moreover, the developing nations then neither did have any major consumption of the ocean minerals nor

18. Phillips in UN DOC. A/P. V. 1833, 15 Dec' 1969, pp. 6-77.
Also UN DOC A/C. I./PV 1709, Dec' 1969, p. 26.

had a financial loss at stake. Therefore, a very few developing states would suffer from seabed mining.

The collective struggle of the developing states resulted in the adoption of a Resolution by General Assembly in the 'Charter of Economic Rights and Duties of States' which is the basis of the New International Economic order. This development rendered US demand of freedom of the sea weaker.

Article 29 of the UNCLOS III established strongly the Common Heritage principle for seabed as it emphasised that the Seabed and Ocean foor and the subsoil thereof beyond the limit of national jurisdiction as well as the resources of that area are the Common Heritage of Mankind. All states shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and the benefits derived therefrom are shared equitably by all states taking into account the particular interest and needs of developing countries. Therefore, the Common Heritage principle finally prevailed over the 'Freedom of the Sea' concept.

Beside the access to the mineral resources, another issue on which North and South had differing opinion was the principle on which the International Seabed Authority (ISA) should be based and what would be its mining system. In general, developing nations favoured the creation of a strong supernational organisation having control over every aspect of resource exploitation, because only a strong international organisation can ensure smooth exploitation. On the other hand, the United States and other industrial nations preferred a standard organisation having limited goals and functions, because a strong international organisation would provide an unnecessary bureaucratic barrier to efficient operation at best, and could even function as an adversary to existing mining regime.[19]

As to the creation of norms of the ISA, the developing nations endeavoured to seperate the issue of who may mine from how they might mine and favoured that all development of regulations should

19. Barkenbus, 'Deep Seabed Resources', p. 104.

be left to the Authority to decide once it was established. To do otherwise would prematurely freeze the nature of activities in the 'Area' before the actual shape and extent of the total endeavour was clearly perceived. On the other hand, United States argued that the conditions of exploration and exploitation should be explicitly provided for approaching the specificity of a 'mining code'.[20]

As to the allocation of costs and benefits, US proposed for apportionment of mining companies' 'net proceeds' on a specific percentage basis. Developing nations, on the other hand, favoured that the apportionment of the proceeds from mining on a percentage basis should be left to the descretion of the Authority and the amount could be fixed through negotiation between the two. Moreover, when United States favoured the apportionment of net profit, the developing nations favoured a 'revenue sharing'.

It is interesting to note that while the US always opposed a strong seabed authority, it favoured a 'compulsory dispute settlement' provision for it. On the other hand, the developing nations showed a reluctance to make this power of the seabed authority as compulsory.

As to the mining system, there were diverging opinions among different nations. The US favoured the 'Banking system' or the 'twin area system' whereby 50% of the 'Area' would be subject to joint venture between mining entities and Authority where a maximum operating discretion would be accorded to the state on private mining company and the other 50% would be reserved to the Authority for either dircet exploitation or joint venture. On the other hand, the 'parallel' on banking system did not find favour with G-77, rather they favoured an operation enterprise system whereby the Authority itself is vested with the exclusive right to explore and exploit the resources of the 'Area'. But realising the practicality that mining can hardly be made without mining nations' help, some moderate developing nations indicated their willingness to

20. *Ibid*, page 105.

accept a 'banking' on parallel system, provided other compromises were made in the negotiations.

North and South again was divided on the issue relating to the function and power of the "Assembly' and 'Council' of the Seabed Authority. 'One-nation, One-vote' system for the Assembly was advocated by the developing nation to the displeasure of the developed nations. The developing nations stressing the concept of sovereign equality of all states, argued that major authority decisions needed to be made by the international community as a whole i.e. the Assembly and not by a small representative body such as the Council. The developed nations, however, stressing the efficiency of a smaller body argued in favour of vesting power primarily in the Council. But the Single Negotiating Text (SNT) favoured the promotion of a strong Assembly.

The issue relating to the acceptable basis of choosing the members of the Council, the South always pressed for selection of national delegates on the basis of an equitable geographical distribution, whereas the North argued for a special interest representation, claiming that the Council should primarily reflect the interest of those nations most deeply concerned with or involved in deep seabed mining. Finally, a mixed system was accepted. The system of distribution of the total 36 members and their equal status did not find favour with US which all along pleaded for a voting system that would in effect be a veto over Council decision. The South favoured that the Authority should have control over production and pricing so as to avoid adverse affects of the mineral export earnings of developing nations. But the North preferred not to grant any such power to the Authority but to provide for a system of compensation to the affected developing nations.

The establishment of Enterprise received strong support from G-77 but the US and other mining entities made their support to the creation of 'Enterprise' contingent upon a parallel system of mining that would allow relatively free access to seabed minerals for

their own mining entities. Moreover, although US agreed to supply all basic mining requirements like capital, technology etc, it was not willing to submit to the open ended obligations as provided in the Informal Composit Negotiating Text or ICNT.

These were the major issues on which the split between the North and South became acute, enhancing the divergence of interest between the two bloc. Throughout the negotiations, the US believed that the Conferance showed a bias towards the G-77, but at the same time the US was of the openion that the latter would have ultimately no choice but to accept a regime favourable to US and other industrial nations since they possess the vital technology and finance to conduct seabed mining. But such idea proved to be wrong because Common Heritage of Mankind is not only a slogan to G-77 but much more than that. It represents a combination of moral, legal and political principle, the way to rictify their long history of colonial suffering and exploitation.

V

US National Policy vs UNCLOS III

For centuries the Law of the Sea was based on custom. It developed through uniform & consistent state practice which became somewhat disturbed at the middle of this century when demand from various countries to codify the existing law emerged. It was followed by numerous multilateral treaty negotiations including the Hague Codification Conference of 1930 & the three United Nations Conferences on Law of the Sea, in 1958, 1962 & in 1982. Still today custom is palying a very important role inspite of the 1982 Conference, because some industrial states have rejected the Convention and adopted their own sea policy on the basis of customary international law of the sea. Besides this, the 1982 Convention is yet to come in force, as Article 308 (1) Of the Convention states that 'This Convention shall enter into force 12 months

after the date of deposit of the sixtieth instrument of ratification or accession..[21] So until the 1982 Convention comes into force, the custom and Convention shall exist side by side, but the question is that what will be the position of the non-parties to the Convention once it comes in force? In other words, is there any scope for the non-parties to justify their national policy once the international order is adequately established? Another important question which arose following the US refusal to sign is that can it be invoked against third party or non-party ?

Under article 34 of the 1969 Vienna Convention on the 'Law of Treaties', 'A treaty does not create either obligation or rights for a third state without its consent". But it was later modified by article 38 that provisions of multilateral treaties that reflect customary norms can be invoked against as well as by third states. On the basis of this argument it was thought that as the Convention generally codfies the existing customary rules, it can be invoked by a third party as source of right as well as obligation. Beside codifying customary law, treaties occassionally includes new laws which has the potentiality of becoming customary law with the assent of states and their practices for long time and can be used by or against third parties.

But the 1982 Convention made a diversion to the above traditional state practice through the emergence of the concept of 'Package Deal'. The essence of this package was that as the problems of ocean are interrelated, all the decisions shall be reached by consensus and because it is not possible to serve the interest of all, compromise should be made on the basis of give and take. In other words, package deal ensures the total exclusion of any selective approach.

Although full consensus could be achieved as to the 12-mile territorial sea and 200-mile EEZ at UNCLOS III, problem arose as to the issue of passage through straits used for international navigation, the outer most limit of the continental shelf, the

21. Hugo Caming and Michael R. Molitor, "Progressive Development of International Law and Package Deal", *American Journal of International Law*, Vol 79, Oct. 1915, page 872.

aspiration of the land-locked countries and geographically-disadvantaged countries etc. The US representative to the 2nd session of 1982 Convention, Ambassador John R. Stevenson made US position clear by saying, "we are prepared to accept and indeed we would welcome general agreement on a 12 mile outer limit for the territorial sea and a 200 mile outer limit for the economic zone provided it is part of an acceptable comprehensive package Including a statisfactory regime within and beyond the economic zone and provisions for unimpeded transit of straits used for international navigation,"[22] But the General Assemly viewed that such a policy of reservation cannot be allowed since the Convention is an overall 'package deal' reflecting different priorities of different states; to permit reservation would inevitably permit one state to eliminate the *'quid'* of another states *'quo'*.[23]

Therefore, as reservations were not allowed, President Reagan proclaimed on 10 March 1983 a *New National Ocean Poiicy* and 200 nm-EEZ for the US. This proclamation was accompanied by a presidential policy statement accepting those provisions of the 1982 Convention which relates to the traditional uses of the ocean and which generally confirms existing maritime law and practice and fairly balance the interests of all states. It was also declared that USA shall exercise its right of navigation, overflight etc, in a manner consistant with the balance of interest reflected in the Convention and will recognise the rights of other states in the water off their coast as reflected in the Convention, so long as the rights and freedoms of the USA and others under international law are recognised by such coastal states.[24] Senator Claiborn Pell said before the Review Committee discussing US position on whether to sign the 1982 Convention tnat 'What we are doing is saying this is a pretty interesting treaty. Those cherries that we like we will eat but those cherries that we do not like we will ignore.

22. *Ibid*, page 875.
23. *Ibid.*
24. James L. Malone, 'Foreign Policy', page 59, Vol. 54. 1984.

Those cherries that we like we say are customary international law but those cherries that we do not like we say we will not adhere to.[25]

Now the question is how USA is going to stick to its position as to customary law since 1982 Convention does not allow third states to take resort to such practice. It has been possible because there are certain limitations of the package deal. The package deal can not affect those provisions of the Convention which were carried over directly from the 1958 Convention and which were customary law prior to UNCLOS III. Those provisions irrespective of their inclusion in the 1982 Convention continue to be binding on the third states. Although 1982 Convention have changed many customary law, but it has not yet acquired similar status e.g. article 17 of the 1982 Convention as to the right of innocent passage reflects the customary law of the 1958 Convention on the territorial sea and contiguous zone but changes in article 18 and 19 as to the meaning of passage and meaning of innocent passage have not yet acquired the same status.[26]

The other group of provisions that remained unaffected by the package deal includes all of the innovative provisions of the 1982 Convention that achieved customary status while the negotiations, were being held i.e. after the Conference began in 1973 and before the adoption of the treaty on 30 April 1982, because the package deal could not have crystallizd all the provisions of the Convention into an indivisible whole before the treaty was adopted. It is only those provisions which have not yet attended customary status i.e. provisions relating to transit passage and the 'Area', the third states find it difficult to invoke.[27]

Therefore, the notion at UNCLOS III that time and *openio juries* as required to create a customary law, is not a requisite

25. Hugo Caminos and Michael R. Molitor "Progressive Developmen of International Law and Package Deal", *American Journal of International Law*, Vol. 79, Oct. 1985, page 886.
26. *Ibid*, page 189.
27. *Ibid.*

because entire international community acted collectively and swiftly to indicate its consent at UNCLOS III, does not seem to be appropriate because (i) absence of formal objection to any provision by any state does not indicate its consent to be bound in every instance and (ii) the true test for the existence of a customary norms of interna tional law is still state practice and as of article 38 (i) of the statute of International Court of Justice, it applies international custom as evidence of general practice accepted as law.[28]

Therefore, though the package deal represents an indivlsible package of interrelated compromise in which non-parties cannot generally find support for the exercise of customary rights, but because of certain limitations of the package non-parties may exercise customary rights; not the new rights created by the Convention. In this way, United States can justify its action i.e. to exercise the customary rights provided by the Convention and to follow its own domestic policy in cases which are contrary to its interest and have not yet attained the status of customary law.

Implications of US Non-Acceptance of UNCLOS III

US refusal to sign the Convention on the one hand caused international disappointment and on the other, growing apprehension within the US that the country will suffer a long term policy set back with grave implications for US influence in global economic and political affairs.[29] Some of the possible negative effects of not signing the Convention might be as follows :

(1) Innocent passage is allowed within territorial sea i.e. one which is not prejudicial to the peace, good order or security of the coastal state. As it depends entirely on coastal states descrition to decide which passage is innocent or not, the coastal states shall have enough scope of preventing US vessels on the meager plea of collecting information even if such information was taken as to the

28. *Ibid.*
29. Leigh S. Ratiner, "Law of the Sea: Crossroad for American Foreign Policy" *Foreign Affairs*, Vol. 60, 1982, page 1007.

environment. With the spread of the concept of 'zone of peace and security' the US naval mobility will be gravely affected. The same applies in case of achipelagic water, since each archipelagic state is the final arbiter to decide what is essential for its secnrity.

(2) Coastal states may limit US activities within their economic zone or may construct artificial islands or scientific installations in such a way so as to interfere with foreign warship navigation.

(3) The Convention has given the coastal states sovereign right in the continental shelf for exploitation of natural resources but prohibited 'unjustifiable interference with navigation or other freedom of other states'. So unjustifiable interference could be a matter of interpretation specially where less than friendly political relations exist.

(4) During the period of crises the US military vessels may be subject to restriction of mobility in the narrow areas of sea and through straits.

(5) Activities on the high sea and the 'Area' are preserved by the Convention absolutely for peaceful purposes. Therefore, the traditional role of ocean as the battle ground, road to war, peacetime demonstration of military power etc. has been seriously challenged. Marine scientific research is also to be undertaken, as of the Convention, for peaceful purpose and with consent of the coastal states. Therefore, what is peaceful for one state, may not find favour with other states. Moreover, a signatory state may cause trouble for non-signatory state by not giving or delaying such consent.

(6) The International Court of Justice might show some bias towards the provision of the LOS Convention in settling a dispute between a signatory and a non-signatory state.

(7) In absence of adequate protection, the mining companies of the US may flee to other states so as to operate under the treaty and gain universal acceptance of their mining claims.

From the above it is very clear that though the United States has won a battle when she stood alone at the LOS Conference, it is very much doubtful to what extent this victory will prevail. With the reversal of *Mare Clausium* i. e. closed sea and encloser of about 32% (28 million square mile) of the Ocean space under national jurisdiction, freedom of the sea is very seriously challenged. UNCLOS III has not yet received the necessary ratification to be in force, but the possibility of conflict has made the US to rethink its policy as was evident by the formation of Panel of Experts on 'Law of Ocean Uses'.

The Panel of Experts during their negotiations and exchanges with the Reagan Administration favoured the signing of the Convention by the US, because it was of the opinion that acceptance by the US of the Convention and of its disposition in fact, if not in form, is in the interest of the US and mankind and that 'deep seabed mining' is still a distant prospect and is of little present economic value. The US reservation as to the regime for deep seabed mining should be the subject of continued negotiation and they should not undermine the wide consensus that has been achieved otherwise.[30]

The Panel of Experts recommended the Reagan Administration to adopt the following principles:[31]

1. To adopt a clear and consistent policy applicable to all organs of the US government, of adherence to all of the rules of the Convention excluding only the seabed provisions. It must respect all of its duties including the limitations on its rights even if it does not exercise all its rights. The reason behind such advice is the fact that US national policy adopted on March 10, 1983 is not fully consistent with the Convention, remain vague on seabed issues since it made reference only to navigation and overflight. The legislation

30. Hugo Caminor and Michael R. Molitor, "Progressive Development of International Law and Package Deal", *American Journal of International Law*. January 1985, Vol. 79, No. 1, page 151.

31. *Ibid*, page 154.

introduced in the Congress to implement an EEZ was also not fully consistent with LOS Convention.

2. To encourage and urge other states including allies to do the same.

3. should find a way to make compulsory dispute settelment an effective part of US policy and that of other nations binding at least on the basis of issues of navigation and pollution. The Panel of Experts views that it is preferable to minimize the circumstances in which if diplomacy fails, USA is forced to choose between concession and conflict. It was for this reason that the US took the lead in seeking a system of compulsory third-party settlement of disputes in the framework of the Convention. Another reason is that the Convention specifically authorized the exclusion of adjudication of issues arising out of military activities. Moreover, the submission of disputes were not made compulsory to the International Tribunal on LOS. The Panel of Experts suggested the US government two methods through which US participation in dispute settlement can be achieved:[32]

1. dispute settlement agreement with other countries concluded
(a) as treaties with the advice and consent of he Senate or
(b) as executive agreements pursuant to authority granted by Congress.

2. Congress might approve US acceptance of compulsory dispute settlement on condition of reciprocity and subject to such other terms and limitations as may be found necessary. For example, using the reciprocating states' provisions of the 1980 Deep Seabed Hard Minerals Resources Act as a model, an act of Congress could specify the conditions for US acceptance of the dispute settlement provision of the Convention and authorise the Secretary of State to designate a foreign state as "a reciprocating state" if it finds that the state has accepted the dispute settlement provisions of the LOS Convention in relation to the US.

32. *American Journal of International Law* April 1987, Vol. 81 No. 2, page 441.

Therefore, much rethinking was done within the US administration, but Reagan retained his earlier position i.e. to remain outside the scope of the Convention, even though he said that except seabed regime all provisions of the Convention were suited to US interests. A fair segment of the US administration thought the act of Reagan as premature, as there was scope for modification of seabed mining through negotiations, even after signing the Conventions and viewed that US interests would be served better under the treaty, than no treaty at all.

Conclusion

UNCLOS III represents a unique ocean order. It is the achievement of man's age-old quest for an effective ocean order. With the emergence of numerous independent states and in view of a widening gap between the developed and developing states the need for such an order became more acute. UNCLOS III finally fulfilled that need.

The United States, which in the past always favoured a universal order for the ocean, could not accept certain provisions of UNCLOS III as it contradicted with US policy of 'Free Enterprise'. Also US could not accept a Convention where its superior position in world would be undermined. Although the provisions of UNCLOS III satisfied the US military interest so far as the naval mobility is concerned, US perception of security through unhindered access to strategic raw materials in the seabed made the US position more rigid.

On the other hand, the third world countries, being euphoric about their united political strength could not miss the chance of playing a leading role at UNCLOS III. They were determined to achieve victory of their 'Common Heritage' principle and made no concession in that regard.

Thus, the rigid positions of both the US and the Group of 77 resulted into bifurcated ocean order. United States adopted for

itself a National Ocean Policy of their own and justifid its position on the rationale that without being a party to the Convention, the US can practice those provisions of the UNCLOS III which have become customary international law. US attitude towards the Convention has created a world wide indignation. Possibilities of confrontation between the two systems cannot be ruled out once the UNCLOS acquires required number of ratification to be in force. The USSR, Japan, France and India have already invested a large amount of money in seabed exploitation under UNCLOS III and any check on the part of the US in that regard will engender choas and conflicts in international relations.

Therefore, both the US and the developing states should adopt a conciliatory attitude towards the UNLOS III and should try to workout a viable seabed authority which is universally acceptable. US should understand that the costs of isolation are far greater than those of accepting some of the demands of the South. Moreover, it would be a great loss to US. if it is left behind in the most comprehensive global system thus far undertaken and the other global actors look determined that it could proceed without the US help. On the other hand, the developing nations should realise that accomplishment of ideological victory is not enough, it needs finance and technical know-now to materialize that victory.

Therefore, the Seabed Authority should be considered a transitional regime which should introduce a mixed political and economic system. At the initial stage, the Authority should not be viewed as some instrument of goal fulfilment by any particular group of countries. The aim should be to establish a workable Seabed Authority and for that every state should supply technical knowhow, man power and necessary finance. Once the 'Authority' becomes self-financing through taxation etc. and acquire all the necessary technology, it shloud be decided on what principle the real mining should be conducted. But it takes time. Such a system should be based on cooperation and pragmatism, not on old fashioned self-interest.