To accede or not to accede: An analysis of the current US position related to the United Nations law of the sea

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ABSTRACT

The 1982 United Nations Convention on the Law of the Sea (hereafter “UNCLOS”) is one of the most significant legal instruments of modern times, though the United States (US) has yet to join the 167 nations that have signed the document. Until the twentieth century, freedom of the seas led to inequity among nations, violence, and environmental disasters. UNCLOS provides a peaceful legal structure to resolve border disputes and enforce anti-pollution regulations while maintaining freedom of navigation, safety at sea, and marine scientific research efforts. However, the legitimacy of UNCLOS continues to deteriorate as China acts unilaterally while its global economic reach expands. Additionally, the US cannot participate in international agreements to access ocean resources in the deep seabed or claim portions of the Arctic due to non-accession to UNCLOS. Such accession would protect global security as the balance of power otherwise becomes increasingly unstable. The US must also accede to ensure economic development for itself as well as the preservation of coastal resources upon which many nations rely. In conclusion, US non-accession will risk global security, economic development, and the US position of strength.

1. Introduction

A triumphant statement referencing the culmination of the most comprehensive ocean legislation in history was not enough to convince the United States (US) to join the world in celebration. Nor was the subsequent ratification by 167 nations of this defining agreement covering the rights and responsibilities of states on the seas [1]. The United Nations Convention on the Law of the Sea III (hereafter “UNCLOS” or “the Convention”) is generally deemed a success as it addresses a wide range of disputes including the prevention of armed conflict, border disputes, freedom of navigation, safety, and pollution. Every US presidential administration since Reagan supported UNCLOS. Nevertheless, the US is the only major maritime power that is not a party to the convention [2]. It is time for that to change. Global security, economic development, and the US position as a world leader are at stake if the US does not ratify UNCLOS.

The power of UNCLOS lies in its ability to bridge the gap across nations with differing needs and customs. In doing so, UNCLOS provides a global standard from which a foundation for international maritime law is based. This law governs resources that many nations depend for subsistence, as well as over 90% of trade which occurs by ship [3]. UNCLOS grants all nations freedom of the high seas commonly used for transit navigation and commerce, rules for conduct on the ocean, and a path to conflict resolution through international courts. For coastal nations, it grants rights to the resources off that nations coast. For many nations, especially smaller developing ones that rely on fish, this is a life or death matter. Principally, UNCLOS balances subsistence needs of coastal populations with the territorial expansion tendencies of larger ones. It invokes a multilateral power that is otherwise left to the strongest unilateral aggressors [4]. As the global balance of power shifts, citizens around the globe rely on the strength of multilateral frameworks, including UNCLOS, to ensure their rights are defended. The Convention incorporates timeless principles that provide methods for conduct and conflict resolution based on centuries of precedent, custom, and lessons learned.

UNCLOS is the net result of a battle between age old ideologies. The desire for an open ocean with free trade is pitted against the benefits of apportionment and property rights. While geopolitical circumstances change, the underlying problems that drove the development of UNCLOS remain as relevant as ever. For example, resource scarcity,
territorial disputes, pollution, piracy, and safety at sea must be continuously addressed. Ideologically, developed nations with established nationalistic and corporate interests have an ever-increasing appetite fueled by an interconnected global commercial web, while smaller nations are increasingly constrained to their own resources. As the strength of large economic powers push smaller nations further into poverty, those nations increasingly rely on international law to sustain themselves. UNCLOS addresses all of these competing interests, but without leadership support from the US, its future is in jeopardy. US military, economic, and moral backing will be required to ensure that the smaller nations of the world will not run out of the resources upon which they depend, that the global economy continues to reach its full potential through interconnected growth, and that the seas do not become the lawless bastions of crime they once were. On top of that, if the US joins it gains the ability to compete for access to Arctic and other resources through continental shelf claims, participate in the mining of the deep seabed through the International Seabed Authority, and to have a greater role in the international decision-making processes.

UNCLOS is dangerously close to deterioration, and so US involvement is a critical component to global stability. Fundamental geopolitical changes since the time the law was developed have further exacerbated the timeless matters that UNCLOS addresses. China has emerged as a world power and is reshaping trade agreements and source use with all of the South China Sea countries, neglecting lawsuits through proper UNCLOS channels. China also has a fleet of 2600 distant water fishing vessels, ten times that of the US, that travel all the way to Senegal, which relies on those fish for 85% of the nation's protein consumption, and costs West African countries $2 billion annually [5]. Arctic ice is melting with the potential of opening new trade routes [6]. Piracy has also re-emerged as a threat to the shipping industry [7]. With all of these changes, it is time for the US to reevaluate its critical role in relation to UNCLOS. As a world leader, the US support for and accession to UNCLOS would legitimize the multidimensional agreements within the document and directly benefit the United States.

2. Background

The complexities of coastal zone management and multinational agreements covering ocean uses have been known to world leaders for at least two millennia. Faced with a need for stable shores to dock boats and expand trade routes, Alexander the Great enlisted the help of businessmen, engineers, masons, as well as geography and climate experts to build the port city of Alexandria from 332 to 331 BCE. With the discovery of monsoon winds making for faster east India voyages, the Egyptians occupying Alexandria appointed a military “commander of the Red and Indian Seas” to protect commercial shipping [8]. And so it was for many years, that the seas were not a safe place and nations desiring to expand did so with the force of military strength.

Coastal populations have long competed over fishing grounds, port land use, and the customs of the seas. Early attempts to establish laws regarding these subjects included Rhodian Law from the Isle of Rhodes off the Grecian coast, which is referenced in Roman and Byzantine codes. Rhodian Law is credited with considering naval law of the seas, rules for compensation and behavior of sailors, and responsibility of ship or cargo damage. The exact date of origin for this law ranges between a presumed 916 years before Christ, when the Rhodians first gained sovereignty of the seas, and prior to the first written reference of the law in the 14th book of Justinian's code recorded in approximately CE 533 [9].

Despite these gains in structure, many controversial issues related to international ocean law standards persisted. The collection of past laws and extracts from Roman opinions between CE 527 and 565 by Byzantine emperor Justinian I, commonly referred to as Justinian's Code, did not actually constitute a new legal code [10]. As a result, the mere mention of Rhodian Naval Law did not settle the principal debates over the nature of the oceans. On the one hand, large or powerful countries that took part in global exploration had an interest in maintaining freedom of the seas for navigation. Some seafaring communities travelled as they pleased to access new resources and conquer new lands. For example, the Vikings travelled south to England, west to Greenland, and north to the Barents Sea seeking new resources [11]. Other nations broadly divided up the earth to grant each other sections to explore and exploit. The year after Columbus' 1492 discovery of the New World, Spanish rulers Ferdinand and Isabella received support from Spanish-born pope Alexander VI in the form of a proclamation demarcating a line from pole to pole 100 leagues, or 320 miles, west of Cape Verde. The pope granted any discovery west of the line to Spain, and east of the line to Portugal, so long as it was not already in the hands of a Christian.

The papal ruling did not satisfy Spain and Portugal, let alone all of the other nations with competing claims across the ocean. None of the other coastal European nations even accepted the papal disposition. The line also did not grant Portugal enough space to conduct their African voyages, or solidify any of their claims to the New World. In an effort to more equitably distribute the oceans between these two nations, Spain and Portugal signed the Treaty of Tordesillas in 1494 moving the demarcation line to 370 leagues, 1185 miles, west of Cape Verde. Pope Julius II finally acknowledged this change in 1506, granting Brazil to Portugal [12]. While this may have alleviated concerns for Spain and Portugal, many other nations were not included. The seafaring British and French sought land in the New World, while the smaller nations in Scandinavia were only granted sovereignty over coastal waters if it was demanded by kings and defended by militaries.

Complaints from the King of Norway and of Denmark in 1616 that resulted in British fishermen refraining from fishing in Norwegian coastal waters [13] represented a fundamental inability of nations to pinpoint an international standard for ocean and coastal laws. The abundant fishing grounds off the coast of Norway were vital to the entire population, but limiting the seas in this way was contradictory to previous traditions. Custom, which required nations to derive legal obligations through the repetitive acts of other states in the community which created the norms, was more open [14]. The general conclusion between states in seafaring communities evolved to a circumstance wherein nations valued the benefits of unrestricted access over the benefits of restricting other nations’ access. Hugo Grotius described this custom in 1609 with his famous argument for Mare Liberum in which he affirmed, “the Freedom of the Seas or the right which belongs to the Dutch to take part in the East Indies Trade”. He continued, “that which cannot be occupied cannot be the property of anyone, because all property has arisen from occupation”. This laissez faire regime of freedom of the seas became the norm for centuries as European nations explored, colonized, and used locations around the globe in their own self-interest.

Mare Liberum lasted from the early seventeenth century until the mid-twentieth century. During that period, any ship could go anywhere in the world, limited only by a customary 3-mile strip of sea that was alleged to have derived from the cannon shot distance off the shores of coastal states [15]. The openness of the seas left many nations concerned with the high reduction in fish stocks by fleets from far away as well the threat of pollution, including oil and noxious gas, as a by-product of ships involved with international trade. Simultaneously, the world's navies had grown larger and were competing across the world’s oceans, adding to global instability [16]. Indeed, these characteristics of the seventeenth century nautical world were similar to the Egyptian progression from individual boats slips on the Nile to military protection for growing commercial shipping fleets. Not much had changed in the way of ocean law or custom.

In 1945, US President Harry Truman took the first step as a global leader toward what would become UNCLOS. Truman’s first proclamation unilaterally extended US natural resource claims to the continental shelf off the US coast, while the second established conservation zones to protect fisheries in parts of the high seas [17]. Argentina followed
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