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## **THE TIME IS NOW: THE UNITED STATES NEEDS TO ACCEDE TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA TO EXERT INFLUENCE OVER THE COMPETING CLAIMS IN THE SOUTH CHINA SEA**

### **I. Introduction**

The dispute over who controls the ocean is not new. Two years after Christopher Columbus's first expedition to America, Pope Alexander VI drew a line through the Atlantic Ocean, dividing it into two parts: the west side belonged to Spain and the east to Portugal.<sup>1</sup> In addition, Spain received the Pacific Ocean and the Gulf of Mexico, and Portugal received the South Atlantic and the Indian Ocean.<sup>2</sup> Even though today, there are many more international communities to consider, using a line is still a widely accepted approach to designate which body of water is yours and which portion belongs to your neighbor.

It was not until 1982, that nations adopted a means of determining which parts of the ocean each country had sovereignty over--the U.N. Convention on the Law of the Sea (UNCLOS).<sup>3</sup> While the United States has signed the treaty, the U.S. Senate has yet to accede to UNCLOS. With China recently re-exerting its influence in the South China Sea, there is perhaps a greater incentive for the United States to finally accede to this multilateral treaty.

Part II of this Comment will first describe the customary international views on the law of the sea, before the United Nations began its series of conferences to develop a uniform maritime law. It will discuss the progression of conferences that the United Nations held before the creation of UNCLOS in 1982. Part II will then describe different elements of UNCLOS that are relevant to this Comment including the limits on the territorial sea, the International Seabed Authority, and the Exclusive Economic Zone (EEZ). Finally, it will discuss the 1994 Addendum added primarily to address U.S. concerns. Part III of this Comment will examine \*2 the arguments voiced by those opposed to acceding to UNCLOS. It will also consider the arguments of those supporting the accession to UNCLOS.

Part IV of this Comment will then discuss the importance of the South China Sea and China's claims in the region. This section will next examine China's gradual expansion in the South China Sea, and mention the competing claims of some of the territories in the region. Specifically, Part IV will describe China's strategy in its gradual expansion, and this section will contrast China's opinion of the rights it has within its own EEZ with what UNCLOS provides. Part IV will conclude with a description of why China's expansion in the South China Sea is of consequence to the United States. Part V will consider the potential effects that the United States' accession of UNCLOS would have on China's expansion. Part VI will examine why it is prudent for the United States to accede to UNCLOS. This Comment will argue that the United States needs to accede to UNCLOS to exert influence over the competing territorial claims in the South China Sea.

## II. The Law of the Sea Treaty

### A. Pre-1982 U.N. Convention on the Law of the Sea

The seventeenth century saw the advent of the freedom-of-the-seas doctrine, constraining countries' jurisdiction over the seas to a narrow strip surrounding the coastline.<sup>4</sup> The remaining sea was "free to all and belonging to none."<sup>5</sup> International law regarding the sea developed through custom:

Common maritime practices [that] became widely accepted and were adopted as law by maritime and coastal states alike: International law of the high seas has evolved over the years based on accepted and agreeable practices of nations. It has generally been held that usage becomes an international legal norm when it has been repeated over a period of time by several states, when they have generally acquiesced in such behavior by one another, and when governments begin to act in certain ways out of a sense of legal obligation. Customary acceptance of the practice of nations, over time, results in international law and is binding on all nations.<sup>6</sup> The mid-twentieth century brought a change, as countries wished to further their claims over the seas due to increased pollution and fishing concerns.<sup>7</sup> Further, "there was no consensus to the limit of national claims to resources of the sea or seabed beyond a nation's narrow territorial sea."<sup>8</sup> Along with other international \*3 communities, the United States was concerned.<sup>9</sup>

The United States recognized "the long range world-wide need for new resources of petroleum and other materials."<sup>10</sup> In September of 1945, President Harry S. Truman issued Proclamation 2667--The Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf.<sup>11</sup> In President Truman's proclamation, the United States claimed jurisdiction over "the natural resources of the subsoil and sea shelf beneath the high seas but contiguous to the coasts of the United States."<sup>12</sup> The Outer Continental Shelf Lands Act of 1953 (OCSLA)<sup>13</sup> both codified and modified Proclamation 2667 by defining the Outer Continental Shelf (OCS).<sup>14</sup> The Act did not limit the extent of the U.S. continental shelf in miles but claimed all subsoil and seabed to the deep seabed.<sup>15</sup>

At least twenty nations followed President Truman's proclamation, making similar claims regarding the extent of their continental shelves, which eventually led to disputes.<sup>16</sup> The U.N. General Assembly convened its first U.N. Conference on the Law of the Sea in 1958 to quell such clashes.<sup>17</sup> However, the 1958 Conference did not resolve several key issues, such as the extent of the territorial sea and fishing limits.<sup>18</sup>

In 1960, the United Nations held its second Conference on the Law of the Sea to consider the limits of the territorial sea and fishery territories.<sup>19</sup> However, these \*4 issues were deferred once again<sup>20</sup> until the third U.N. Conference on the Law of the Seas, held from 1973 to 1982.<sup>21</sup>

In November 1967, before this third conference, Malta's U.N. ambassador, Arvid Pardo, addressed the General Assembly, alerting countries to conflicting legal claims over territory and warning of an impending conflict that could devastate the oceans.<sup>22</sup> Pardo noted that five-sevenths of the Earth's surface was covered by the ocean floor and seabed.<sup>23</sup> Up to this point, most of both the ocean floor and seabed had been unexplored due to a lack of science and technology.<sup>24</sup> However, recent developments made further exploration possible which, even in its early stages, saw many unclaimed resources.<sup>25</sup>

Ambassador Pardo foresaw “a breakdown of law and order on the oceans . . . looming on the horizon,”<sup>26</sup> as countries began racing for sovereign rights over the ocean floor:

There was now a real danger, Malta pointed out, that technically equipped countries might wish to appropriate the ocean floor for their national use, not only to develop its immense resources, but particularly for defense purposes-- perhaps through mobile near-bottom nuclear missile systems or through fixed military installations on the ocean floor. The result would be a competitive scramble for sovereign rights over the ocean floor leading to an escalating arms race, widening the gap between the rich, technologically developed countries and the poorer countries, and endangering the traditional freedom of the high seas. World tensions would thereby be greatly increased.<sup>27</sup>

Pardo concluded his speech by asking for “an effective international regime \*5 over the seabed and ocean floor beyond a clearly defined national jurisdiction.”<sup>28</sup> Pardo's urging became “a global diplomatic effort to regulate and write rules for all ocean areas, all uses of the seas and all of its resources.” By 1973, the Third U.N. Conference on the Law of the Sea began what became a nine-year process to create a comprehensive treaty for the oceans.<sup>29</sup>

## **B. 1982 U.N. Convention on the Law of the Sea**

In 1982, the United Nations adopted the U.N. Convention on the Law of the Sea<sup>30</sup> --“a legal regime governing activities on, over, and under the world's oceans.”<sup>31</sup> The Convention was and is, “an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life.”<sup>32</sup>

### **1. Limits on the Territorial Sea**

When determining universal limits on the territorial sea, or the boundaries between national and international waters, nations disagreed.<sup>33</sup> Smaller nations with less powerful navies supported a wide territorial sea, which would provide a greater protective barrier from those with more powerful navies.<sup>34</sup> In contrast, great naval powers preferred small territorial seas to protect their fleets' freedom of movement.<sup>35</sup> For example, major naval powers wanted a three-mile limit because a twelve-mile limit “would effectively close off and place under national sovereignty more than 100 straits used for international navigation.”<sup>36</sup> The United States argued for the “free passage through straits” which would treat these straits as international waters.<sup>37</sup> Coastal states worried that this would threaten their national security and instead demanded the twelve-mile territorial sea, fearing foreign warships too close to their shores.<sup>38</sup> For example, the Strait of Gibraltar separates Morocco from Spain by about eight nautical miles at its narrowest point, connecting the Atlantic Ocean to the Mediterranean Ocean.<sup>39</sup> Spain, Morocco, and other coastal states sought a twelve-mile territorial sea to control passage through \*6 this body of water.<sup>40</sup> Since the Strait of Gibraltar is the most accessible entrance to the Mediterranean Sea, the United States and other countries were concerned about access to trade routes.<sup>41</sup> Ultimately, both sides settled on the rule of “transit passage” which retained the international status of the straits,<sup>42</sup> but also mandated that ships must not threaten nor use any force against coastal states.<sup>43</sup> Additionally, member states agreed upon a twelve-mile territorial sea, in which a coastal state would have jurisdiction.<sup>44</sup>

### **2. The Exclusive Economic Zone**

The exclusive economic zone gives states the right to resources beyond their territorial seas. According to UNCLOS, a coastal state has

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.<sup>45</sup>

The EEZ extends 200 nautical miles from the shore of a coastal state.<sup>46</sup> This is very generous, considering that approximately 87% of the world's known, and estimated, hydrocarbons<sup>47</sup> beneath the sea lie within a 200 nautical mile boundary.<sup>48</sup> In addition, the most lucrative fishing areas are found in EEZs due to the abundance of phytoplankton, the primary food source for fish, near the shore.<sup>49</sup> In return for this generous EEZ, coastal states agree to obligations such as protecting fish populations from depletion through overfishing.<sup>50</sup>

Apart from the EEZ, coastal states may explore and exploit the resources of \*7 the continental shelf.<sup>51</sup> The continental shelf consists of the seabed and subsoil "that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."<sup>52</sup> States with a wider shelf have rights to the natural resources of the seabed up to 350 miles or further, depending on certain geological criteria.<sup>53</sup> For states with shelves smaller than 200 miles, their territorial sea extends to a maximum of 200 miles.

UNCLOS requires states to make payments for any resources found beyond the 200-mile boundary of their territorial seas.<sup>54</sup> UNCLOS sets up payment rates and collects compensation from the resources after the first five years of production at the site.<sup>55</sup> Beginning in the sixth year, "the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter."<sup>56</sup>

### 3. International Seabed Authority

UNCLOS also established the International Seabed Authority which is comprised of all the states which signed the Treaty.<sup>57</sup> The Authority is further divided into an Assembly, a Council, and a Secretariat.<sup>58</sup> The Assembly consists of all members of the Authority, and each member has one representative.<sup>59</sup> The Council consists of thirty-six members of the Authority who are elected to fulfill pre-determined categories,<sup>60</sup> such as four members who are major net exporters of minerals from their area.<sup>61</sup> Finally, the Secretariat shall be "the chief administrative officer," elected every four years by the Assembly from candidates proposed by the Council, and given the task of running all meetings.<sup>62</sup>

The payments collected from resources gathered beyond the 200-mile EEZ go to the Authority which "distribute[s] them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of \*8 developing States, particularly the least developed and the land-locked among them."<sup>63</sup> There are no mandates governing the use of the money.<sup>64</sup>

### 4. 1994 Addendum to UNCLOS

Despite U.S. involvement in negotiating the terms of UNCLOS, when the time came for the United States to sign it, President Ronald Reagan refused.<sup>65</sup> On July 9, 1982, President Reagan released a Statement on United States Actions Concerning the Conference on the Law of the Sea.<sup>66</sup> President Reagan was concerned that the Convention's provisions on deep seabed mining would discourage future development.<sup>67</sup> He further feared that the decision-making process would neither protect nor reflect American interests, and that the deep mining provisions would allow the accession of future amendments without U.S. approval.<sup>68</sup> Finally, he feared that UNCLOS allowed too much international regulation over deep seabed mining, an idea which was shared by some U.S. allies.<sup>69</sup>

President George H. W. Bush addressed the issue again when he took office, and his administration began new negotiations concerning President Reagan's concerns.<sup>70</sup> The mining provisions underwent significant revisions in the 1990s, culminating in the Part XI Agreement, which created changes that satisfied each of President Reagan's complaints.<sup>71</sup> The United States was guaranteed a seat on the seabed Council once it became a party,<sup>72</sup> "ensur[ing] that U.S. approval would be necessary for any decision that would result in a substantive obligation on the United States, or that would have financial or budgetary implications."<sup>73</sup> These changes finally brought about U.S. support: in July 1994, President Clinton "transmitted the convention to the U.S. Senate for its advice and consent."<sup>74</sup>

### \*9 III. Accession of UNCLOS by the United States

Despite the United States' deep involvement in drafting both UNCLOS and later, the Part XI Agreement, the United States has not yet acceded to it.<sup>75</sup> In fact, the United States is the only coastal nation in the world which has not acceded to UNCLOS.<sup>76</sup> Even though the treaty apparently receives widespread domestic support, loud opposition from a vocal minority has prevented its accession in Congress.<sup>77</sup> Since UNCLOS took effect in 1994, every U.S. president, both Democratic and Republican, has supported its accession.<sup>78</sup> In 2004, the Senate Foreign Relations Committee unanimously approved UNCLOS, and in 2007, the committee approved it by a vote of seventeen to four.<sup>79</sup> The treaty has never come up for a vote in the full Senate, however, because of opposition from a few key Senators.<sup>80</sup>

#### A. Opposition to UNCLOS Accession

UNCLOS opponents are primarily concerned that the treaty poses a threat to U.S. sovereignty.<sup>81</sup> This minority bases its argument on the premise that "any treaty that grants the United States sovereignty over anything inherently undermines American sovereignty by implying that we needed an international treaty in the first place."<sup>82</sup>

Further, UNCLOS critics claim that the treaty already carries the force of customary international law<sup>83</sup> and thus does not need to be acceded to by the \*10 United States.<sup>84</sup> These opponents argue that "the Navy and merchant fleet do fine now and for decades previously without the pact's freedom-of-the-seas guarantees."<sup>85</sup> Since UNCLOS developed from customary law, "the provisions represent widely accepted customary international law, some of which has been recognized as such for centuries."<sup>86</sup>

Further, acceding to UNCLOS is not essential to the mission of the U.S. military. In 1993, the Department of Defense issued an Ocean Policy Review Paper in 1993 to determine if U.S. national security interests have been protected despite our absence from UNCLOS:

U.S. security interests in the oceans have been adequately protected to date by current U.S. ocean policy and implementing strategy. U.S. reliance on arguments that customary international law, as articulated in

the non-deep seabed mining provisions of the 1982 Law of the Sea Convention, and as supplemental by diplomatic protests and assertion of rights under the Freedom of Navigation Program, have served so far to preserve fundamental freedoms of navigation and overflight with acceptable risk, cost and effort.<sup>87</sup> In the twenty years since the issuance of that paper, no evidence suggests that acceding to UNCLOS would be crucial to the U.S. Navy.<sup>88</sup>

Additionally, critics are concerned with the lost profits that would be generated if the United States accedes to the Treaty. Currently, the Bureau of Ocean Energy Management in the U.S. Department of the Interior manages the sale of offshore natural mineral leases.<sup>89</sup> The minimum annual royalty rate is 12.5%.<sup>90</sup> Since the United States would be required to offer 7% of profits to the Authority after twelve years of profits,<sup>91</sup> the United States could end up giving away more than half of its total revenue from the drilling, as 7% of profits would come out of the 12.5% royalty revenue from the lease.<sup>92</sup> The U.S. Treasury would only retain the difference, or 5.5%.<sup>93</sup>

\*11 Not only are dissenters upset that money that would otherwise go to the federal government may go elsewhere, but they are also upset that these funds may go to countries whose interests the United States does not support. Steven Groves of the Heritage Foundation<sup>94</sup> details that the United States would not be able to prevent the Authority from giving the proceeds to “state sponsors of terrorism, . . . the undemocratic, despotic, and/or brutal regimes . . . [or] corrupt regimes.”<sup>95</sup> Critics also worry that there are no rules or guidelines as to how the developing nations should use the money.<sup>96</sup> Countries are not required to spend the revenue on anything maritime related, nor are they obligated “to spend the revenue on humanitarian or development projects, even though most, if not all, of the eligible recipients are supposed to be poor, developing countries.”<sup>97</sup>

Finally, the vocal minority opposed to UNCLOS is unhappy with the Treaty's redistributionist aspect: distributing the proceeds from wealthier nations' resources to the landlocked or underdeveloped.<sup>98</sup> Critics are concerned that UNCLOS “seeks to transfer wealth from U.S. companies exploiting energy resources to poorer, landlocked countries--setting a dangerous precedence for wealth distribution.”<sup>99</sup> In a hearing before the Senate Foreign Relations Committee, former Secretary of Defense, Donald Rumsfeld, likened this wealth distribution aspect to a “massive form of global welfare, courtesy of the American taxpayer.”<sup>100</sup>

Some Senators, like Arizona Senator, Jon Kyl, have proposed a compromise by which “Congress could enact a statute that makes the navigational parts of the treaty, which codify the historical practice of seafaring nations, the law of the land.”<sup>101</sup> Instead of acceding to the treaty, Congress would enact parts of the treaty via domestic legislation.<sup>102</sup> This would not solve the problem, however. UNCLOS \*12 is a “package deal,’ to be accepted as a whole in all of its parts without reservation on any aspect.”<sup>103</sup> Because UNCLOS has to be accepted in its entirety, the United States cannot selectively accept certain provisions of the treaty; it must accept them all, or it cannot be a party to UNCLOS.

## **B. Support for UNCLOS Accession**

In the spring of 2012, then-Senator John Kerry decided to make the accession of UNCLOS his priority.<sup>104</sup> As the Chairman of the U.S. Senate Committee of Foreign Relations, he set up three hearings in the middle of 2012 on the question of whether to support accession to the treaty.<sup>105</sup>

On May 23, 2012, Secretary of State Hilary Clinton, Secretary of Defense Leon Panetta, and Chairman of the Joint Chiefs of Staff General Martin Dempsey spoke at the first hearing before the Senate Foreign Relations Committee regarding the accession of UNCLOS.<sup>106</sup> On June 14, 2012, the second hearing took place, containing even more military leaders vocalizing their support for the accession of UNCLOS: Admiral James A. Winnefeld, the Vice Chairman of the Joint Chiefs of Staff; Admiral Jonathan W. Greenert, the Chief of Naval Operations; Admiral Robert J. Papp, Jr., the Commandant of the U.S. Coast Guard; General William M. Fraser, III, the Commander of U.S. Transportation Command; General Charles H. Jacoby, Jr., the Commander of U.S. Northern Command; and Admiral Samuel J. Locklear, III, Commander of the U.S. Pacific Command.<sup>107</sup> The message of these key U.S. armed forces leaders could not have been clearer. As Secretary Panetta concluded, “[t]he time is now, for this Senate to do what others have failed to do: ratify the Law of the Sea Convention.”<sup>108</sup>

First, without the protection now guaranteed by UNCLOS, U.S. companies are not likely to invest in deep seabed mining.<sup>109</sup> At a hearing before the Senate \*13 Foreign Relations Committee, Jay Timmons, President and CEO of the National Association of Manufacturers, spoke on manufacturers' behalf and expressed the hesitancy to invest: “[t]he development of deep seabed claims is incredibly expensive. Companies in the U.S. are reluctant to invest heavily in deep seabed mining because of the risk that their activities would not withstand a legal challenge since the U.S. is not a party to the Convention.”<sup>110</sup> For instance, the Pacific Ocean contains a large supply of nodules, rock-like substances that contain minerals such as nickel, copper, and cobalt.<sup>111</sup> There is currently no cost-effective way to remove these nodules from the ocean floor.<sup>112</sup> It is possible that developing a procedure to extract the metal from the nodules will be the most expensive part of the process.<sup>113</sup> Further, methane hydrates<sup>114</sup> are another potentially enormous alternative energy source found in the ocean with extraction technology in its infancy.<sup>115</sup> Unless the United States accedes to UNCLOS, U.S. companies will be less likely to invest in deep seabed mining of the nodules and exploitation of methane hydrates, leaving untouched great resources that would add much revenue to the U.S. Treasury.

The United States needs to invest in off-shore drilling for its national defense: “The U.S. requires an incredible number of military products for which rare earth minerals [which are found in abundance in the seabed] are essential.”<sup>116</sup> In the past, military products were manufactured in the United States.<sup>117</sup> Today, a “tremendous number of our bullets are manufactured in China . . . meaning that if we find ourselves cross-wise with the Chinese, they can cut off our supply of bullets.”<sup>118</sup> It is a matter of national security that the United States be self-reliant on ammunition \*14 for its weapons.<sup>119</sup> The United States needs to accede to UNCLOS to give companies the security to invest in offshore drilling, in order to be able to manufacture bullets independently from its own supply of rare minerals.<sup>120</sup>

Further, since the United States relies on customary international law as the legal basis for its maritime powers, it has no concrete law for its actions.<sup>121</sup> Secretary Clinton characterizes this as “risky.”<sup>122</sup> The members of UNCLOS are free to change the laws of navigation at any time without United States input.<sup>123</sup> Admiral Samuel J. Locklear, III, Commander of the U.S. Navy in the Pacific, noted that the customary laws of the sea are not immune from change:<sup>124</sup> “there is a marked trend now toward coastal states claiming more jurisdiction over their adjacent waters than the current convention recognizes.”<sup>125</sup> For example, emerging coastal powers would likely call for a new version, favoring a larger EEZ with more limited rights for noncoastal states.<sup>126</sup> Limited rights would not be in the United States' interest—with the largest navy in the world, United States' freedom to navigate is crucial. State Parties to the agreement would be able to reinterpret the terms of the customary international law, “contrary to the original intent that [the United States] and other maritime powers helped to negotiate.”<sup>127</sup> Therefore, the United States needs to accede to UNCLOS to exert its influence over the Convention members to ensure that the international maritime laws are beneficial to the United States.

In addition, due to the 1994 changes made to UNCLOS, the United States is the only country to have a permanent seat on the Council.<sup>128</sup> Secretary Clinton noted this significance and could not find another international body that allows only one country a permanent seat on the decision making panel.<sup>129</sup> With a permanent seat on the Council, the United States would have a huge level of influence over matters raised before the Council, should it choose to accede to the \*15 Treaty.<sup>130</sup>

Finally, acceding to UNCLOS would allow the United States to curtail foreign countries' eager expansion into further territories. Secretary Clinton mentioned, "[o]nly as a [p]arty to the Convention can the United States best protect the navigational freedoms enshrined in the Convention and exert the level of influence that reflects our status as the world's foremost maritime power."<sup>131</sup>

For example, the Arctic is a large area where multiple countries currently assert their jurisdiction. Countries have begun their expansion due to the effects of global warming.<sup>132</sup> Because of rising ocean temperatures, ice caps have melted, causing areas that were once covered by ice to be accessible by ships.<sup>133</sup> Countries have begun experimenting with new shipping routes and are actively searching for natural resources in the region.<sup>134</sup> The search for natural resources has only just begun, as the resources are now accessible in the water.<sup>135</sup> The ice caps that once served as a difficult obstacle to bypass are gradually disappearing, making access to the region much easier.

In particular, the United States has a large extended continental shelf in the Arctic, full of these untapped resources.<sup>136</sup> The United States would be in a better position to argue disputes, such as one with Canada concerning the emerging neutral territory, if it acceded to UNCLOS.<sup>137</sup> As Secretary Panetta noted:

Joining the Convention would maximize international recognition and acceptance of our substantial extended continental shelf claims in the Arctic. As we are the only Arctic nation that is not a party to the Convention, we are at a serious disadvantage in this respect. Accession would also secure our navigation and over-flight rights throughout the Arctic, and strengthen our arguments for freedom of navigation through the Northwest Passage and Northern Sea Route.<sup>138</sup> Acceding to UNCLOS would help the United States solidify security over its jurisdiction in the Arctic, by providing both new trade routes and opportunities for deep seabed mining and the legal framework to support these activities.

#### **IV. China's Expansion Into the South China Sea**

China is a signatory to UNCLOS.<sup>139</sup> Having ratified UNCLOS, China is \*16 obliged to follow the treaty's mandates concerning its country's EEZ. However, China has a unique interpretation with respect to the waters of the South China Sea, based on old Chinese navigational maps.<sup>140</sup> This interpretation has caused problems as China claims sovereignty over islands in the South China Sea, likely for the natural resources that the area has to offer and perhaps for control of navigation in the area.<sup>141</sup> This sovereignty claim can be an important issue for the United States as it has treaty responsibilities with the Philippines and economic ties to Vietnam--both the Philippines and Vietnam are arguing with China over the sovereignty of the South China Sea and small barren islands in the South China Sea.<sup>142</sup>

##### **A. The Importance of the South China Sea**



The South China Sea is vital to the United States and world policy. Half of the world's gas, oil, and shipping tonnage navigate this area.<sup>143</sup> Approximately \$5.3 trillion of global trade passes via the South China Sea each year.<sup>144</sup> Likewise, the area is particularly critical to U.S. trade;<sup>145</sup> \$1.2 trillion of the \$5.3 trillion total global trade passes through U.S. ports.<sup>146</sup> In addition, while the fish stocks in the South China Sea are both depleted and poorly controlled, there is still a growing demand due to local population increases.<sup>147</sup> The South China Sea holds almost one-tenth of the world's fisheries used as food for people.<sup>148</sup> Finally, the potential for natural resources is equally great. Recent reports found that the South China Sea holds about 1.6 billion barrels of recoverable petroleum, while some Chinese studies increase this estimate by a power of ten.<sup>149</sup> Further, it is estimated that a large amount of methane hydrates are in the South China Sea--"initial median estimates [of methane hydrates] place . . . China's [reserves] at 5 trillion cubic meters."<sup>150</sup> Control of the South China Sea is thus very important.

#### **\*17 B. China's Claims in the South China Sea**

China claims about 90% of the 3.5 million square kilometer China Sea.<sup>151</sup> In 1947, President Chiang Kai-shek's nationalist government first officially published an "eleven-dashed line" map to mark China's dominion in the South China Sea.<sup>152</sup> When the Zhou Enlai (Communist) government gained control of China in 1949, it maintained the general layout of the eleven-dashed line<sup>153</sup> but excluded the Gulf of Tonkin.<sup>154</sup> Although China's new map, the "nine-dashed line" map,<sup>155</sup> is what China currently uses as a claim to its domain, it has no basis in international treaties.<sup>156</sup> In fact, "these claims are generally considered outrageous by everyone except the Chinese."<sup>157</sup> China sent a document to the United Nations on May 7, 2009 with their nine-dashed line map attached.<sup>158</sup> In the letter, China claimed

indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and [that China] enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. The above position is consistently held by the Chinese Government, and is widely known by the international community.<sup>159</sup> According to the nine-dashed line map, China has dominion over 90% of the South China Sea, including the Paracel Islands, the Spratly Islands, and the Scarborough Shoal.<sup>160</sup>

Despite China's "indisputable sovereignty,"<sup>161</sup> the nation has remained ambiguous about whether it declares full sovereignty over the entire water enclosed by the nine lines or "something less than that."<sup>162</sup> At the very least, China does claim the islands inside the nine lines, as specified through one of its domestic laws, the Law on the Territorial Sea and Contiguous Zone, enacted in 1992.<sup>163</sup> China is vague in defining its sovereignty because:

**\*18** If Beijing defined its claim to conform with the provisions of this treaty [UNCLOS], it would almost certainly reduce the scope of Chinese territory and expose the government to criticism from vocal nationalists.

Alternatively, if Beijing was to maximize the extent of its claim to include all or most of the territory within the nine-dashed line, it would be difficult to justify under international law and antagonize its neighbors.<sup>164</sup> That is, if China claims everything outright, including the islands and seas within its "nine-dashed line map," it would violate UNCLOS.<sup>165</sup> But if it does not claim everything, Chinese nationalists--who claim a "historical basis" for sovereignty over the seas--will be upset.<sup>166</sup> While the map was only officially published in 1947, the Chinese embassy reported in March 2008 that "the dotted line of the South China

Sea indicates the sovereignty of China over the islands in the South China Sea since ancient times and demonstrates the long-standing claims and jurisdiction practice over the waters of the South China Sea.”<sup>167</sup>

### C. China's Expansion in the South China Sea

While China's unilateral command of the South China Sea in 1949 can be seen as a nominal expansion, China has more recently began to exert physical control over various islands in the region. Currently, China is involved in disputes over three islands in the South China Sea: the Paracel Islands, the Spratly Islands, and the Scarborough Shoal.<sup>168</sup> Although nearby countries have been in disagreement for some time, “the intensification of the disputes is due in part to an increase in assertiveness by China in stating and defending its maritime territorial claims.”<sup>169</sup> Further, “it is the Chinese claim--because of its aggressive scope, the history behind it, and China's growing military capacity to back it up--that poses the real problem to regional stability.”<sup>170</sup>

#### 1. The Competing Claims

Both China and the Philippines claim ownership of the Spratly Islands in the \*19 South China Sea.<sup>171</sup> Applying UNCLOS, the Philippines clearly has jurisdiction--the Spratly Islands fall well within the two hundred mile EEZ.<sup>172</sup> Further complicating the matter, Taiwan, Vietnam, and, to some extent, Malaysia,<sup>173</sup> also claim jurisdiction over this group of islands.<sup>174</sup> The Spratly Islands are currently occupied by all of these countries,<sup>175</sup> and while almost none of the islands are completely habitable, “control over them could give a claimant rights to an area thought to be potentially rich in energy resources.”<sup>176</sup>

China, Taiwan, and Vietnam also claim ownership of the Paracel Islands, though they are currently occupied by China.<sup>177</sup> China forcibly took control of this group of islands from South Vietnam in 1974.<sup>178</sup> In addition, China claims ownership over the Scarborough Shoal, along with Taiwan and the Philippines.<sup>179</sup> The Scarborough Shoal is problematic, as it falls inside the Philippines's EEZ and also within China's nine-dash line map.<sup>180</sup>

#### 2. China's Strategy

Aside from the territory it claims, the way in which China is expanding its reach is also noteworthy. China employs a strategy known as “salami-slicing.”<sup>181</sup> In other words, China is implementing the “slow accumulation of small actions, none of which is a casus belli,<sup>182</sup> but which add up over time to a major strategic change.”<sup>183</sup> China has been incrementally claiming more territory for the nation.<sup>184</sup> The gradual expansion of China places the United States in a bad position: “[a] salami-slicer puts the burden of disruptive action on his adversary. . . . If sliced \*20 thinly enough, no one action will be dramatic enough to justify starting a war.”<sup>185</sup>

For example, in April 2012, China and the Philippines were in the middle of a naval standoff in the Scarborough Shoal when the Philippines found Chinese fishing vessels inside its EEZ.<sup>186</sup> Later, in June, China established “Sansha City” on Woody Island in the Paracel Islands.<sup>187</sup> China intends “Sansha [to] be the administrative center for China's claims in the South China Sea, to include the Spratly Islands . . . and Scarborough Shoal.”<sup>188</sup> China also shared its intent to base a military garrison at Sansha.<sup>189</sup> Finally, the China National Offshore Oil Corporation (CNOOC), a state-owned oil developer, publicized a list preventing bidding by foreign oil exploration companies on certain areas in the Vietnamese

EEZ.<sup>190</sup> Vietnam, however, had already leased some of these offshore blocks to developers.<sup>191</sup> Although few experts suggested that a foreign developer would “legitimize China's over-the-top grab of Vietnam's economic rights,”<sup>192</sup> it is important to note that China did not care about the EEZ demarcations in this situation. China has signed and ratified UNCLOS--it should be following those guidelines. These three examples show an “attempt to gradually and systematically establish legitimacy for its claims in the region” using the “salami-slicing” method.<sup>193</sup>

Another strategy that China uses is its selection of law enforcement agency ships.<sup>194</sup> In its disputes in the South China Sea, China uses ships from its paramilitary maritime law enforcement agencies rather than from its navy.<sup>195</sup> Even though the ships from the paramilitary maritime law enforcement agencies are typically unarmed or lightly armed, they are “effective in confrontations with unarmed fishing vessels.”<sup>196</sup> Most of the countries with which China is disputing over sovereignty do not have equivalent ships; “for those countries, the only ships available to send out in response to the deployment of Chinese paramilitary law enforcement ships might be regular navy ships, in which case sending them out might leave those other countries vulnerable to the accusation that they were escalating the crisis.”<sup>197</sup> This fear of being accused of escalating the crisis is likely why China chooses to use paramilitary ships rather than formal naval vessels.

Finally, China has been slowly improving and expanding its navy.<sup>198</sup> After \*21 decades of increasing its military spending, improvements in Chinese naval engineering are producing a fleet that is primarily focused on regional maritime dominance. Further, the fleet is focused on deterring intervention by the United States in any potential conflict over Taiwan or in the South and East China seas, where Beijing contests control of disputed islands and maritime resources with several Southeast Asian countries and Japan.<sup>199</sup>

While an amplified Chinese naval fleet would still not be enough to take on the U.S. Navy, it could still “pack[] a punch for localized conflicts in Asian waters.”<sup>200</sup> China already has six Aegis-equivalent warships,<sup>201</sup> and Taiwanese analysts anticipate that China will build at least ten more.<sup>202</sup> Japan's six Aegis-equipped warships and South Korea's three would have a difficult time defeating China's sixteen.<sup>203</sup> Further, China's quickened production of an advanced destroyer “will tilt the regional balance of power at sea in its favor and put it in a stronger position to enforce its sovereignty claims . . . in the South and East China Seas.”<sup>204</sup>

#### **D. China's Dispute Over the EEZ**

In addition to disputes over which land and seas it maintains dominion over, China also disputes its rights within its own EEZ.<sup>205</sup> Along with twenty-six other nations, China argues that UNCLOS gives coastal states the right to control economic activities--as well as all foreign military activities--in their own EEZs.<sup>206</sup> Generally, China claims that “reconnaissance activities undertaken without prior notification and without permission of the coastal state violate Chinese domestic and international law.”<sup>207</sup>

Most countries, including the United States, disagree with this position, asserting that while the EEZs “give[] coastal states the right to regulate economic \*22 activities (such as fishing and oil exploration) within their EEZs, it does not give coastal states the right to regulate foreign military activities in the parts of their EEZs beyond their 12-nautical-mile territorial waters.”<sup>208</sup> Specifically, the United States argues that nothing in UNCLOS prevents the right of any country's military forces to carry out military activities in EEZs without consent.<sup>209</sup>

Whether the United States can carry out unarmed reconnaissance missions with prior approval from China continues to be a source of conflict between the two nations.<sup>210</sup> There have been multiple conflicts between U.S. and Chinese

ships and aircraft since March 2001.<sup>211</sup> “China routinely intercepts U.S. reconnaissance flights conducted in its EEZ and periodically does so in aggressive ways that increase the risk of an accident.”<sup>212</sup> For example, in April 2001, there was a collision between a U.S. reconnaissance plane and a Chinese fighter jet.<sup>213</sup> Since neither ocean surveillance ships nor U.S. reconnaissance planes are armed, the United States might dispatch armed escorts in response to dangerous behavior by Chinese naval vessels and aircraft.<sup>214</sup> From there, the fear is that a misunderstanding might result in an exchange in fire “leading to further military escalation and precipitating a major political crisis.”<sup>215</sup> This would neither be in the best interest of the United States nor China.

### **E. Reasons Why the United States is Concerned About Chinese Expansion in the South China Sea**

There are various reasons why the United States is concerned with China's increasing presence in the South China Sea. First, the United States cares because it has treaties with countries in the region which currently claim sovereignty to the same islands that China is now claiming.<sup>216</sup> For example, the United States has a treaty in force with the Philippines.<sup>217</sup> The 1951 U.S.-Philippines Mutual Defense Treaty came into effect on August 27, 1952.<sup>218</sup> Article IV states that “[e]ach Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.”<sup>219</sup> Article V of the Treaty defines an armed attack on either of the parties to include island \*23 territories under its jurisdiction.<sup>220</sup>

Despite what appears to be a strong interest in curtailing China, the United States's official position concerning China's expansion is not to take a position. On August 3, 2012, the State Department issued a press statement on the U.S. position regarding the territorial disputes in the South China Sea:

As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.<sup>221</sup> One commentator believes that the United States has remained neutral because it does not want to “pre-commit itself to a sequence of events over which it may have no control.”<sup>222</sup>

Despite not taking a formal position on the competing territorial claims, President Barack Obama has shown an increased interest in the area. Recently, he has focused on “pivoting” our troops from the Middle East to the Pacific;<sup>223</sup> “[The United States] is stepping up its military presence in the region as part of a strategic ‘pivot’ towards Asia after more than a decade of wars in Iraq and Afghanistan.”<sup>224</sup> Not only does this new strategy make China wary, but the recent transfer of U.S. troops has caused the Philippines and Vietnam to become more willing to confront China.<sup>225</sup> In other words, “[the Philippines and Vietnam] think they have the U.S. on their side.”<sup>226</sup>

Further, the fact that the United States has interests in the area is important because China has differing opinions regarding the control China can have in its EEZ.<sup>227</sup> The United States's navy depends on moving without impediment in the sea:

The legal right of U.S. naval forces to operate freely in EEZ waters is important to their ability to perform their missions around the world, because many of those missions are aimed at influencing events ashore, and having to conduct operations from more than 200 miles offshore \*24 would reduce the inland reach and responsiveness of ship-based sensors, aircraft, and missiles, and make it more difficult to transport Marines and their equipment from ship to shore.<sup>228</sup>

Reaching a consensus on the issue is critical, as restrictions on U.S. naval forces' operations in EEZ waters could possibly require a change in U.S. foreign policy goals or a change in U.S. military strategy.<sup>229</sup>

#### V. Potential Effects of the United States' Accession of UNCLOS on China's Expansion

Currently, the State Department's suggestion to the competing claims in the South China Sea is for all of the nations to follow UNCLOS.<sup>230</sup> It is hypocritical for the United States to encourage another country to follow UNCLOS without actually acceding to it herself.

Further, China is less likely to listen to the United States from a "position of weakness."<sup>231</sup> According to one commentator, conversations between the United States and China regarding foreign military activity in China's EEZ currently look like this:

Chinese official: Your navy ships have no right to be in our exclusive economic zone without our permission.

American official: Yes they do. The U.N. Law of the Sea Convention, which reflects customary international law, provides other states have freedom of navigation in exclusive economic zones.

Chinese official: You are not a party to convention, so it doesn't matter what it says--you have no standing to make that argument.<sup>232</sup> If the United States acceded to UNCLOS, then China's response could no longer be, "You are not a party to the convention." Admiral Locklear, the U.S. Navy Commander in the U.S. Pacific Command, has mentioned that in the South China Sea, where "competing claims and counter claims in the maritime domain are becoming more prominent . . . the effectiveness of the U.S. message is somewhat less credible than it might otherwise be, due to the fact that we are not a party to the convention."<sup>233</sup> The United States would finally have standing to make the argument that China needs to follow UNCLOS.

The United States's accession to the treaty may not solve the problem, \*25 though, as China has a history of signing treaties and subsequently violating them. For example, China is "a signatory to the Nuclear Nonproliferation Treaty but remains a notorious nuclear proliferator, and it is a member of the World Trade Organization yet brazenly disregards its trade obligations."<sup>234</sup> Further, despite being one of the permanent five members of the Security Council, China openly violates U.N. sanctions.<sup>235</sup> Therefore, it is unlikely that the United States's accession of UNCLOS alone would serve to deter China from further claiming territory in the South China Sea. Acceding to UNCLOS may not stop the problem of China expanding in the South China Sea, but it would certainly limit criticism if the United States hopes to mitigate the situation by negotiating using the same standards.

## VI. The United States Needs to Accede to UNCLOS

The United States needs to accede to UNCLOS, not only to give its seabed miners the assurance to develop techniques to drill,<sup>236</sup> but to help gain credibility in its dealings with China in the South China Sea.

Without having the authority of UNCLOS as support, U.S. mining companies are unwilling to make the large investment necessary to develop deep seabed mining techniques.<sup>237</sup> The resources which the United States can gather from the seas are necessary to our national security.<sup>238</sup> For example, if the United States gets pulled into a conflict with China over the competing claims in the South China Sea through its treaty with the Philippines, then the United States does not want to be dependent on China for ammunition. If the estimates of materials in the seabed are correct, then the United States needs to take advantage of the natural resources so its military can be independent.

Further, the United States needs to accede to UNCLOS to exert credible influence over the competing territorial claims in the South China Sea. Although the United States has not taken a position on the competing claims in the region, it has urged the parties to follow UNCLOS.<sup>239</sup> Admiral Locklear comments that by becoming a party of UNCLOS, “we place ourselves in a much stronger position to demand adherence by others to the rules contained in the Convention.”<sup>240</sup> Without being a party of UNCLOS, the United States's recommendations to China carry little weight.

The United States should be very concerned about this situation. There are conflicting territorial claims in the South China Sea, such as the Spratley Islands. \*26 Should the Philippines and China end up in an armed conflict over these islands, the Philippines will look to the 1951 U.S.-Philippines Mutual Defense Treaty, and the United States could likely be pulled into war it does not want or need. The United States needs to accede to the treaty to empower her to influence the situation as it now exists.

Additionally, the United States needs to accede to UNCLOS because of the importance of the South China Sea trade routes. China believes that UNCLOS gives it the right to demand notification when foreign countries enter its EEZ.<sup>241</sup> The United States does not believe that it has to notify China when the U.S. military enters Chinese waters. These U.S. reconnaissance missions in the South China Sea are crucial to its military security procedures, if for no other reason than the volume of U.S. trade passing through the area. This disagreement has arisen out of differing readings of UNCLOS. Until the United States accedes to UNCLOS, it has no doctrinal authority to argue with China, because the United States has not agreed to be bound by UNCLOS. As a signatory, the United States would have the ability to take up this issue with the committee to determine what authority each country has to regulate foreign military in its EEZ.

## VII. Conclusion

Now is the time for the United States to accede to UNCLOS. There are off-shore resources unexplored due to the uncertainties in jurisdiction over the resources. There are disagreements over what each country has the right to do within its own EEZ, potentially threatening U.S. military security abroad. The United States needs to have a say in the evolving laws of the sea.

Finally, the U.S. Senate needs to approve accession to UNCLOS in order to exert influence over China's gradual expansion, particularly in the South China Sea. The U.S. military's undivided goal is to accede to UNCLOS—even Secretary Panetta posits, “How can we argue that other nations must abide by international rules when we haven't joined the treaty that codifies those rules?”<sup>242</sup> The answer is: the United States cannot.

Footnotes

- <sup>a1</sup> B.A., Northwestern University 2010, J.D. Candidate, Temple University James E. Beasley School of Law, May 2014. Many thanks to Professor Duncan B. Hollis and Marie-Theres DiFillippo for their advice and guidance on this article. Further, David Gallagher deserves special thanks for tirelessly reading this Comment and countless drafts.
- <sup>1</sup> The United Nations Convention on the Law of the Sea (A historical perspective), Oceans & Law of the Sea United Nations, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (last visited Jan. 28, 2014) [hereinafter United Nations].
- <sup>2</sup> *Id.*
- <sup>3</sup> United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf> [hereinafter UNCLOS].
- <sup>4</sup> United Nations, *supra* note 1.
- <sup>5</sup> *Id.*
- <sup>6</sup> Steven Groves, Accession to the U.N. Convention on the Law of the Sea is Unnecessary to Secure U.S. Navigational Rights and Freedoms 11 (2011), available at [https://thf\\_media.s3.amazonaws.com/2011/pdf/bg2599.pdf](https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf) [hereinafter Groves, Accession].
- <sup>7</sup> United Nations, *supra* note 1.
- <sup>8</sup> Steven Groves, U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf 3 (2011), available at [http://thf\\_media.s3.amazonaws.com/2011/pdf/bg2561.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/bg2561.pdf) [hereinafter Groves, U.N. Convention].
- <sup>9</sup> See United Nations, *supra* note 1 (“[A] tangle of claims, spreading pollution, competing demands for lucrative fish stocks in coastal waters and adjacent seas, growing tension between coastal nations’ rights to these resources and those of distant-water fishermen, the prospects of a rich harvest of resources on the sea floor, the increased presence of maritime powers and the pressures of long-distance navigation and a seemingly outdated, if not inherently conflicting, freedom-of-the-seas doctrine – all these were threatening to transform the oceans into another arena for conflict and instability.”).
- <sup>10</sup> Proclamation No. 2667, 10 Fed. Reg. 12, 305 (Sept. 28, 1945).
- <sup>11</sup> *Id.*; see Groves, U.N. Convention, *supra* note 8, at 3.
- <sup>12</sup> Proclamation, *supra* note 10.
- <sup>13</sup> 43 U.S.C. §§ 1331-1356 (2013).
- <sup>14</sup> See 43 U.S.C. § 1331(a) (2013) (“The term ‘outer Continental Shelf’ means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”).
- <sup>15</sup> See 43 U.S.C. § 1332 (2013) (stating congressional policies as to the OCS).
- <sup>16</sup> Groves, U.N. Convention, *supra* note 8, at 4.
- <sup>17</sup> See *id.* (explaining that the disputes over the breadth of territorial waters and other maritime issues led to the convention).
- <sup>18</sup> See Tullio Treves, 1958 Geneva Conventions on the Law of the Sea Geneva 2 (1958) available at [http://legal.un.org/avl/pdf/ha/gclos/gclos\\_e.pdf](http://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf) (considering the two unresolved issues as important, the United Nations General Assembly made them the main items on the agenda of the Second United Nations Conference on the Law of the Sea).

- 19 Second United Nations Conference on the Law of the Sea, 1960, United Nations Diplomatic Conferences, [http:// legal.un.org/diplomaticconferences/lawofthesea-1960/lawofthesea-1960.html](http://legal.un.org/diplomaticconferences/lawofthesea-1960/lawofthesea-1960.html) (last visited Jan. 31, 2014).
- 20 *Id.*
- 21 Third United Nations Conference on the Law of the Sea, 1973-1982, United Nations Diplomatic Conferences, [http:// legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html](http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html) (last visited Jan. 31, 2014).
- 22 See United Nations, *supra* note 1 (noting super-power rivalry spreading to the oceans, pollution poisoning the sea, and conflicting legal claims over natural resources).
- 23 Question of Promoting the Peaceful Uses of the Sea-Bed and Ocean Floor, 1967 U.N.Y.B. 41, 42 [hereinafter Question].
- 24 *Id.*
- 25 See *id.* at 42 (“Petroleum, natural gas and sulphur, as well as tin, diamonds, phosphorite and coal, were already being mined on the sea-bed under the continental shelf. Explorations had indicated the presence on the ocean floor of immense deposited of manganese nodules which also contained iron, cobalt, copper, nickel, lead and other minerals, as well as phosphorite nodules, petroleum, gas and sulphur, and possible vein deposits in the subsoil of gold, silver, zinc and copper ores. There were also calcareous oozes which could be mined for Portland cement and siliceous oozes yielding pure silica, as well as pelagic clays containing minerals and rare earths. There were, further, the possibilities of using the ocean floor for farming and developed methods of fish husbandry.”).
- 26 Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea, at ii (Dec. 9-10, 2002), available at [http:// www.isa.org.jm/files/documents/EN/Pubs/CommRep\\_web.pdf](http://www.isa.org.jm/files/documents/EN/Pubs/CommRep_web.pdf).
- 27 Question, *supra* note 23, at 42.
- 28 United Nations, *supra* note 1.
- 29 *Id.*
- 30 *Id.*
- 31 Marjorie Ann Browne, Cong. Research Serv., RS21890, The U.N. Law of the Sea Convention and the United States: Developments Since October 2003, at 2 (2007).
- 32 United Nations, *supra* note 1.
- 33 See *id.* (stating that at the start of the Conference, states were divided over whether the universal limit should be set at three miles, twelve miles, between four to ten miles, or 200 nautical miles).
- 34 *Id.*
- 35 *Id.*
- 36 *Id.*
- 37 See *id.* (noting that the Soviet Union also argued for free passage through straits).
- 38 United Nations, *supra* note 1.
- 39 See, e.g., *id.* (explaining that a larger territorial limit would place strategic straits under the national jurisdiction of riparian states).
- 40 *Id.* (expressing concern that a smaller limit would pose a threat to their national security).
- 41 See *id.* (stating that naval powers wanted free access through straits without having to announce their military presence).



- 42 UNCLOS, *supra* note 3, art. 38(1) (“Right of Transit Passage”).
- 43 *Id.* art. 39(1)(b).
- 44 *Id.* art. 3.
- 45 *Id.* art. 56(1)(a).
- 46 *Id.* art. 57.
- 47 Hydrocarbons are organic compounds (as acetylene or butane) containing only carbon and hydrogen and often occurring in petroleum, natural gas, coal, and bitumens. Merriam-Webster Dictionary 608 (11th ed. 2009). Therefore, the discovery of hydrocarbons is so important because it equates to the discovery of energy.
- 48 United Nations, *supra* note 1.
- 49 *Id.*
- 50 UNCLOS, *supra* note 3, arts. 61(2), 61(3) (“[2] The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. [3] Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors ....”).
- 51 *Id.* art. 77(1).
- 52 *Id.* art. 76(1).
- 53 *Id.* art. 76(5); see also United Nations, *supra* note 1 (explaining how states that enjoy a larger underwater shelf may also enjoy expanded rights on that account).
- 54 UNCLOS, *supra* note 3, art. 82(1).
- 55 *Id.* art. 82(2).
- 56 *Id.*
- 57 *Id.* art. 156(1)-(3).
- 58 *Id.* art. 158(1).
- 59 *Id.* art. 159(1).
- 60 See, e.g., UNCLOS, *supra* note 3, art. 161(1)(a)-(e) (“[F]our members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world consumption or have net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case, one State from the Eastern European (Socialist) region, as well as the largest consumer.”).
- 61 *Id.* art. 161(1)(c).
- 62 *Id.* art. 166(1)-(3).
- 63 *Id.* art. 82(4).
- 64 Groves, U.N. Convention, *supra* note 8, at 12.
- 65 *Id.* at 2.
- 66 Statement on United States Actions Concerning the Conference on the Law of the Sea, 2 Pub. Papers 911-12 (July 9, 1982).

- 67 Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing on Senate Treaty Document 103-39 Before the S. Comm. on Foreign Relations, 112th Cong. 4 (2012) [hereinafter Clinton, Hearing on Senate Treaty Document 103-39] (statement of Hilary Rodham Clinton, Former U.S. Sec. of State), available at [http://www.foreign.senate.gov/imo/media/doc/REVISED\\_Secretary\\_Clinton\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf).
- 68 *Id.*
- 69 *Id.* at 5.
- 70 *Id.*
- 71 *Id.*
- 72 *Id.*
- 73 Clinton, Hearing on Senate Treaty Document 103-39, *supra* note 67, at 5-6.
- 74 Groves, Accession, *supra* note 6, at 2.
- 75 Law of the Sea Treaty: Ecuador Signs On, Ala. Dispatch (Oct. 6, 2012), <http://www.alaskadispatch.com/article/law-sea-treaty-ecuador-signs>.
- 76 *Id.*
- 77 James Kraska, Lost at Sea, Foreign Policy, May 16, 2012, available at [http://www.foreignpolicy.com/articles/2012/05/16/lost\\_at\\_sea](http://www.foreignpolicy.com/articles/2012/05/16/lost_at_sea).
- 78 Stewart M. Patrick, (Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty, The Atlantic, June 10, 2012, available at <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/>.
- 79 Kraska, *supra* note 77.
- 80 *Id.*
- 81 *Id.*
- 82 Nathan Kohlenberg, The Imaginary Controversy: The Law of the Seas Battle, The Truman Nat'l Sec. Project (June 18, 2012), <http://trumanproject.org/doctrinc-blog/the-imaginary-controversy-the-law-of-the-seas-battle/>.
- 83 Customary international law consists of “[c]ommon maritime practices [that] became widely accepted and were adopted as law by maritime and coastal states alike: ‘International law of the high seas has evolved over the years based on accepted and agreeable practices of nations. It has generally been held that usage becomes an international legal norm when it has been repeated over a period of time by several states, when they have generally acquiesced in such behavior by one another, and when governments begin to act in certain ways out of a sense of legal obligation. Customary acceptance of the practice of nations, over time, results in international law and is binding on all nations.’” Groves, Accession, *supra* note 6, at 11 (quoting Lieutenant Commander James K. Greene, Freedom of Navigation: New Strategy for the Navy's FON Program, at 5 (Feb. 13, 1992) (published paper to Naval War College) (quoting Walter S. Jones, *The Logic of International Relations* 493 (1985))) (internal quotations omitted in original).
- 84 Kraska, *supra* note 77.
- 85 Kristina Wong and Sean Lengell, DeMint: Law of the Sea Treaty now dead, The Wash. Times (July 16, 2012), <http://www.washingtontimes.com/news/2012/jul/16/demint-says-law-sea-treaty-now-dead/?page=all>.
- 86 The Law of the Sea Convention: Hearing on Senate Treaty Document 103-39 Before the S. Comm. on Foreign Relations, 112th Cong. 13 (2012) [[hereinafter Groves, Hearing on Senate Treaty Document 103-39] (statement of Steven Groves, Bernard

and Barbara Lomas Fellow for The Heritage Foundation), available at [http://www.foreign.senate.gov/imo/media/doc/Groves%20prepared%20testimony%20for%20UNCLOS%20hearing%20\(#final\).pdf](http://www.foreign.senate.gov/imo/media/doc/Groves%20prepared%20testimony%20for%20UNCLOS%20hearing%20(#final).pdf).

87 Id. at 12.

88 Id. But see *infra* Part IV(C)(2) which describes recent developments in Chinese navy that could provide such evidence.

89 Groves, Hearing on Senate Treaty Document 103-39, *supra* note 86, at 6.

90 Groves, U.N. Convention, *supra* note 8, at 8.

91 UNCLOS, *supra* note 3, art. 82(2).

92 Groves, Hearing on Senate Treaty Document 103-39, *supra* note 86, at 4.

93 Id.

94 The Heritage Foundation is a research and educational institution (or “think tank”) whose mission is “to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” See About Heritage, The Heritage Found., <http://www.heritage.org/about> (last visited Nov. 10, 2012). They are known for being one of the main critics of UNCLOS. See Kohlenberg, *supra* note 82 (“those at ... the Heritage Foundation ... are leading the campaign against the Law of the Sea”).

95 Groves, U.N. Convention, *supra* note 8, at 12.

96 Id.

97 Id.

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104 See Jessica Meyers, John Kerry's Secretary of State Dry Run, Politico (June 27, 2012 12:06 AM), <http://www.politico.com/news/stories/0612/77874.html> (describing Kerry's support of the international treaty as the perfect audition for the Secretary of State position). Some spectators say that this is the “perfect audition piece for the secretary of state job he appears to covet” a senior GOP aid said. On February 1, 2013, John Kerry was sworn in as the Secretary of State. See John Kerry's Biography at <http://www.state.gov/r/pa/ei/biog/203657.htm>.

105 Ronald O'Rourke, Cong. Research Serv., R42784, Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress 41 (2013) [hereinafter O'Rourke, Cong. Research Serv., R42784].

106 Patrick, *supra* note 78.

107 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 65-68.

108 The Law of the Sea Convention: The U.S. National Security and Strategic Imperatives For Ratification of Treaty Doc. 103-39 Before the S. Comm. on Foreign Relations, 112th Cong. 4 (2012) [hereinafter Panetta, Hearing on Senate Treaty

- Document 103-39] (statement by Leon E. Panetta, U.S. Sec. of Def.), available at [http://www.foreign.senate.gov/imo/media/doc/SecDef\\_Leon\\_Panetta\\_Testimonydocx.pdf](http://www.foreign.senate.gov/imo/media/doc/SecDef_Leon_Panetta_Testimonydocx.pdf).
- 109 See Patrick, *supra* note 78 (“[T]he chairman of Lockheed Martin sent a strongly worded letter to the Senate saying his company wanted to join the race for undersea riches, but could not assume investment risks until it was clear that it would have a clear legal title to its findings.”).
- 110 The Law of the Sea Convention: The U.S. National Security and Strategic Imperatives For Ratification of Treaty Doc. 103-39 Before the S. Comm. on Foreign Relations, 112th Cong. 4 (2012) [hereinafter Timmons, Hearing on Senate Treaty Document 103-39] (statement by Jay Timmons, President & CEO, National Association of Manufacturers), available at <http://www.foreign.senate.gov/imo/media/doc/NAM%20Testimony1.pdf>.
- 111 William J. Broad, *Mining the Seafloor for Rare-Earth Minerals*, N.Y. Times, Nov. 8, 2010, at D3, available at [http://www.nytimes.com/2010/11/09/science/09seafloor.html?\\_r=0](http://www.nytimes.com/2010/11/09/science/09seafloor.html?_r=0).
- 112 *Id.*
- 113 *Id.*
- 114 See Methane Hydrates and the Potential Natural Gas Boom, STRATFOR Global Intelligence (Feb. 11, 2013), <http://www.stratfor.com/analysis/methane-hydrates-and-potential-natural-gas-boom> [hereinafter Methane Hydrates] (“Methane hydrates, which are natural gas molecules trapped in ice, offer a potentially abundant source of natural gas widely distributed across the globe ... But shale gas deposits as a proportion of global natural gas supplies may seem minor in comparison to methane hydrates. Methane hydrates form at a specific range of low temperatures and high pressures. They occur in the Arctic [sic] permafrost and along continental slopes, typically at water depths greater than 500 meters.”).
- 115 *Id.*
- 116 Andrew Langer, *The Case for Ratification of the Law of the Sea Treaty*, Real Clear Politics (Nov. 28, 2012), [http://www.realclearpolitics.com/articles/2012/11/28/the\\_case\\_for\\_ratification\\_of\\_the\\_law\\_of\\_the\\_sea\\_treaty\\_116272.html](http://www.realclearpolitics.com/articles/2012/11/28/the_case_for_ratification_of_the_law_of_the_sea_treaty_116272.html).
- 117 *Id.*
- 118 *Id.*
- 119 *Id.*
- 120 *Id.*
- 121 Clinton, Hearing on Senate Treaty Document 103-39, *supra* note 67, at 8.
- 122 *Id.*
- 123 Nina Hachigian, *China's Rise is a Big Reason to Ratify the Law of the Sea Convention: Treaty Gives Us a Stronger Hand in the Region*, Ctr. for Am. Progress (June 12, 2012), <http://www.americanprogress.org/issues/china/news/2012/06/12/11698/chinas-rise-is-a-big-reason-to-ratify-the-law-of-the-sea-convention/>.
- 124 The Law of the Sea Convention: The U.S. National Security and Strategic Imperatives For Ratification of Treaty Doc. 103-39 Before the S. Comm. on Foreign Relations, 112th Cong. 4 (2012) [hereinafter Locklear, Hearing on Senate Treaty Document 103-39] (statement by Admiral Samuel J. Locklear, III, U.S. Navy, Commander, U.S. Pacific Command), available at [http://www.foreign.senate.gov/imo/media/doc/Admiral\\_Samuel\\_Locklear\\_III\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Admiral_Samuel_Locklear_III_Testimony.pdf).
- 125 Hachigian, *supra* note 123.
- 126 China would favor this--it would give them a wider claim to the seabed, a more legitimate claim to their “nine-dash” map. See *infra* Part IV.B.
- 127 Locklear, Hearing on Senate Treaty Document 103-39, *supra* note 124.

- 128 Clinton, Hearing on Senate Treaty Document 103-39, *supra* note 67.
- 129 *Id.*
- 130 *Id.*
- 131 *Id.*
- 132 Douglas Peters, UNCLOS: How We're Missing Out on Arctic Opportunity, Truman Nat'l Sec. Project (July 23, 2012), <http://trumanproject.org/doctrine-blog/unclos-how-were-missing-out-on-arctic-opportunity/> (last visited Nov. 12, 2012).
- 133 *Id.*
- 134 Panetta, Hearing on Senate Treaty Document 103-39, *supra* note 108.
- 135 Peters, *supra* note 132.
- 136 Panetta, Hearing on Senate Treaty Document 103-39, *supra* note 108.
- 137 Peters, *supra* note 132.
- 138 Panetta, Hearing on Senate Treaty Document 103-39, *supra* note 108.
- 139 See Tuong Nguyen, South China Sea conflict generates uncertainty and insecurity, GlobalPost (Aug. 24, 2012), <http://www.globalpost.com/dispatches/globalpost-blogs/commentary/south-china-sea-japan-philippines-conflict-islands-taiwan> (“All of the countries boarding the South China Sea, except North Korea, are amount the 162 nations to ratify the treaty.”).
- 140 See *infra* Part IV.B.
- 141 *Id.*
- 142 See *infra* Part IV.E.
- 143 Peters, *supra* note 132.
- 144 Robert Haddick, Salami Slicing in the South China Sea, Foreign Policy (Aug. 3, 2012), available at [http://www.foreignpolicy.com/articles/2012/08/03/salami\\_slicing\\_in\\_the\\_south\\_china\\_sea?page=0,0](http://www.foreignpolicy.com/articles/2012/08/03/salami_slicing_in_the_south_china_sea?page=0,0).
- 145 Panetta, Hearing on Senate Treaty Document 103-39, *supra* note 108.
- 146 Haddick, *supra* note 144.
- 147 Hachigian, *supra* note 123.
- 148 *Id.*
- 149 *Id.*; see also Michael Kelly, China's Blue Water Ambitions and the Law of the Sea, *Jurist* (Oct. 4, 2012), <http://jurist.org/forum/2012/10/michael-kelly-china-unclos.php> (noting that estimates are 213 billion barrels, larger than Saudi Arabia's reserves).
- 150 Methane Hydrates, *supra* note 114. See *id.* for a map of the methane hydrate estimates in the South China Sea.
- 151 David Lague, Analysis: China's nine-dashed line in South China Sea, Reuters (May 25, 2012, 1:18 AM), <http://www.reuters.com/article/2012/05/25/us-china-sea-boundary-idUSBRE84O07520120525>.
- 152 Nguyen, *supra* note 139.
- 153 The primary difference between the eleven and nine-dashed line maps is that the eleven-dashed line map contains the Gulf of Tonkin, thus making China's territorial claim larger under the eleven-dashed line map. *Id.*

- 154 Id.
- 155 See Hachigian, *supra* note 123, for a pictorial representation of China's "9-dashed line" map.
- 156 Nguyen, *supra* note 139.
- 157 Hachigian, *supra* note 123; see O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 7 ("China often characterizes its maritime territorial claims in the South China Sea and East China Sea as 'indisputable,' although they are disputed by other parties.").
- 158 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 12.
- 159 Id.
- 160 Nguyen, *supra* note 139.
- 161 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 12.
- 162 Id.
- 163 Id. at 13-14.
- 164 Lague, *supra* note 151.
- 165 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 11 ("[T]he area inside the nine dashes far exceeds what is claimable as territorial waters under customary international law of the sea as reflected in UNCLOS, and...includes waters that are within the claimable EEZs (and in some places are quite near the coasts) of the Philippines, Malaysia, Brunei, and Vietnam.").
- 166 Lague, *supra* note 151.
- 167 Id.
- 168 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at i. Note that the island names used above are the ones commonly used in the United States. The islands are called other names in other countries.
- 169 Id. at 3.
- 170 Walter Lohman, *Spratly Islands: The Challenge to U.S. Leadership in the S. China Sea*, The Heritage Foundation (Feb. 26, 2009), <http://www.heritage.org/research/reports/2009/02/spratly-islands-the-challenge-to-us-leadership-in-the-south-china-sea>.
- 171 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at i.
- 172 Ben Dolven, et al., Cong. Research Serv., R42930, *Maritime Territorial Disputes in East Asia: Issues for Congress 7* (2013) (113th Congress).
- 173 Brunei also claims jurisdiction, but does not currently occupy the Spratly Islands. O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at i.
- 174 Id.
- 175 Id.
- 176 Dolven, *supra* note 172, at 7 ("[S]ome claimants have gone to the extent of building extensive structures atop small rocks, or basing troops on islets with no fresh water--actions intended to demonstrate control, and some argue even habitability").
- 177 Id.
- 178 Id.

- 179 O'Rourke, *supra* note 105, at i.
- 180 Dolven, *supra* note 172, at 7.
- 181 Haddick, *supra* note 144.
- 182 "Cause of war" in Latin.
- 183 Haddick, *supra* note 144.
- 184 *Id.* ("The goal of Beijing's salami-slicing would be to gradually accumulate, through small but persistent acts, evidence of China's enduring presence in its claimed territory, with the intention of having that claim smudge out the economic rights granted by UNCLOS and perhaps even the right of ships and aircraft to transit what are now considered to be global commons. With new 'facts on the ground' slowly but cumulatively established, China would hope to establish *de facto* and *de jure* settlements of its claim.").
- 185 *Id.*
- 186 *Id.*
- 187 *Id.*
- 188 *Id.*
- 189 Haddick, *supra* note 144.
- 190 *Id.*
- 191 *Id.*
- 192 *Id.*
- 193 *Id.*
- 194 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 17.
- 195 *Id.*
- 196 *Id.* at 18.
- 197 *Id.*
- 198 Michael Richardson, *New Ships Give China's Navy a Stronger Punch*, *The Japan Times*, Sept. 12, 2012, available at <http://www.japantimes.co.jp/text/ea20120912mr.html>.
- 199 *Id.*
- 200 *Id.*
- 201 Aegis destroyers are the most sophisticated combat ships. They are "commonly referred to as air-defense destroyers equipped with phased array radars and modern ship-to-air missiles, which enable the ships to provide regional air defense shields for the entire fleet." *Id.*
- 202 *Id.*
- 203 *Id.*
- 204 Richardson, *supra* note 198.

- 205 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 4 (“China is involved in a dispute ... over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ.”).
- 206 *Id.* at 4. The other countries are Bangladesh, Brazil, Burma, Cambodia, Cape Verde, Egypt, Haiti, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, Uruguay, Venezuela, and Vietnam.
- 207 Bonnie Glaser, *Armed Clash in the South China Sea: Contingency Planning Memorandum No. 14*, Council on Foreign Relations (Apr. 2012), <http://www.cfr.org/east-asia/armed-clash-south-china-sea/p27883>.
- 208 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 4.
- 209 Glaser, *supra* note 207.
- 210 *Id.*
- 211 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 4.
- 212 Glaser, *supra* note 207.
- 213 *Id.*
- 214 *Id.*
- 215 *Id.*
- 216 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 27 (noting that the United States has bilateral defense treaties with Japan and the Philippines).
- 217 *Id.*
- 218 Mutual Defense Treaty, U.S.-Phil., Aug. 30, 1951, 3 U.S.T. 3947 (entered into force Aug. 27, 1952).
- 219 *Id.*
- 220 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 31.
- 221 *Id.* at 20 (emphasis added).
- 222 Haddick, *supra* note, 144.
- 223 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 16 (“[T]he Pentagon intends to send military reinforcements to the region and is establishing new tactical doctrines for their employment against China's growing military power.”).
- 224 Lague, *supra* note 151.
- 225 *Id.*
- 226 *Id.*
- 227 See *supra* Part IV.D for a discussion of China's opinions regarding its control over the EEZ.
- 228 Ronald O'Rourke, Cong. Research Serv., RL33153, *China Naval Modernization: Implications for U.S. Navy Capabilities? Background and Issues for Congress 8-9* (2012).
- 229 *Id.* at 9.
- 230 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 20. (“We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the [United Nations] Law of the Sea Convention”).



- 231 Hachigan, *supra* note 123 (“[U]nfortunately, in debates with China and others, the United States is forced to advance our arguments about these issues from a position of weakness.”).
- 232 *Id.*
- 233 Locklear, Hearing on Senate Treaty Document 103-39, *supra* note 124.
- 234 Gordon G. Chang, *Should the US Ratify the UN Sea Treaty Because of China?*, *World Affairs Journal* (May 21, 2012), <http://www.worldaffairsjournal.org/blog/gordon-g-chang/should-us-ratify-un-sea-treaty-because-china>.
- 235 *Id.*
- 236 Timmons, Hearing on Senate Treaty Document 103-39, *supra* note 110.
- 237 *Id.*
- 238 See *supra* Part III.B for a discussion on the necessity of mining resources.
- 239 O'Rourke, Cong. Research Serv., R42784, *supra* note 105, at 20.
- 240 Locklear, Hearing on Senate Treaty Document 103-39, *supra* note 124.
- 241 Glaser, *supra* note 207.
- 242 Panetta, Hearing on Senate Treaty Document 103-39, *supra* note 108.

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