Northern imperatives : How may the continued US non-ratification of the UNCLOS be explained and to what extent may the Northwest Passage dispute be understood in conjunction?

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Introduction:

The Northwest Passage is a still partly ice-covered sea route2 through the Canadian Arctic Archipelago linking the Atlantic and Pacific oceans together.

The Passage has been somewhat of an obsession for many an explorer and merchant marine throughout history. First described in the 15th century by European colonial powers, a hypothetical trade route to the north and west of the Americas has been a much sought after scenario. However, it wasn`t until 1906 that the route was actually conquered by sea3 when Norwegian Roald Amundsen led his converted fishing vessel Gjøa through the Passage in just about three years. Since then the journey has been made by many others as well.

What make the Passage take on greater political importance today are the projections about tomorrow. That is, that the expected outcome of global warming will be a receding ice cap which in turn will open up the Passage for a whole host of activities. A navigable Northwest Passage would drastically decrease time estimates and fuel costs for ships that are now making the trek from ocean to ocean through the Panama or Suez canals4. It would also open up vast areas for petroleum and mineral exploration. In short, there are huge potential effects to be expected; particularly economic and trade related, but also environmental and security related ones. And the big melt has already begun.

No wonder then that the Passage has slowly but surely moved from mostly being a famed legend in exploration milieus to becoming a seemingly hotter and hotter potato in high politics. The main driving force behind this heat has undoubtedly been and continues to be a long-standing dispute between the United States of America (US) and Canada over the legal status of the Passage.
(p.8)

In the background lies the United Nations Convention on the Laws of the Sea (UNCLOS) – the comprehensive legal framework which currently has some 160 parties5. It deals with all aspects of ocean governance and usage, among other things providing for general rules and guidelines, defining individual states` rights and responsibilities and establishing a system for evaluating sovereignty claims and adjudicating in such matters. It was nine years in the making and represented a massive undertaking – by some deemed the second-most impressive international accord ever, only surpassed by the creation of the United Nations. **Although being one of its prime instigators and having served as its main facilitator during the negotiations, the US has yet to ratify the treaty, as one of very, very few states. It has signed, but not ratified. It is not a matter of the US having to alter its policies profoundly when/if acceding to the UNCLOS. It has voluntarily complied with the tone and spirit of the**

convention since the early 1980s. **What has held the Americans from ratifying is the forceful opposition from a small group of Republican senators who are espousing a rather stable feature in parts of the US populous; profound skepticism toward pooling sovereignty with others for some common purpose and the perceived way in which such multilateral ventures diminute American autonomy, particularly when those ventures are sweeping and serve to challenge core principles. This opposition persists, even though ratification is favored by almost everybody else in the political sphere across the party fault line and even though the objections of President Reagan – a hero to many of these fringe senators – in the 1980s had the direct effect of leading to a package of US-friendly concessions in the negotiation product commonly called the `94 Agreement**.

I wish to explore these two topics in conjunction; US non-ratification of the UNCLOS and its dispute with Canada over the legal status of the Northwest Passage. They are two separate issues, but they sometimes join and become parts of one and the same. This represents a challenge and a caveat. But it also represents a possibility for eliciting interesting contextual knowledge.
(p. 9)

… To reiterate; **the aim of the thesis is to detail how come the US has yet to ratify the UNCLOS despite considerable push factors**, account for the role of the Northwest Passage dispute, and offer some tentative thoughts on the road which lies ahead.
(p. 15)

…**Although consisting of some 320 articles and nine annexes, the UNCLOS is still essentially a framework agreement**. That means that there will be issues on the outskirts of it that may need tweaking to, negotiation of or tinkering with. On the other hand, since it is a framework agreement a tool kit is already in place to deal with many of the challenges that lie ahead. It assumes and anticipates that there will be offshore drilling, that nations will want to extent their grasp on the continental shelf, that pollution and climate change will become a big problem etc. And as such, the framework is already there, complete with dispute settlement procedures and everything.
The UNCLOS is far too elaborate a document to account for in detail here. However, some of its more important features are as follows;

- It determines a 12 nautical mile limit to the territorial sea and secures other states the right of innocent passage through it.
- It secures the right of transit passage through straits used for international navigation.
- It codifies 200-nautical mile economic exclusive zones (EEZs) wherein the coastal states enjoy sovereignty regarding natural resources and certain economic activities, plus exercising jurisdiction over environmental protection and marine science research activities.
- It secures the coastal states sovereign rights to their continental shelf sea beds for exploitation within the EEZs, and even further if they can submit convincing geological evidence to the effect to the newly established body Commission on the Limits of the Continental Shelf (CLCS).
- It sets up the International Seabed Authority (ISA) to manage the future exploration and exploitation of the deep sea bed which lies beyond the additional claims made to the CLCS.
- It codifies the traditional freedoms on the high seas, but appeals to the states to cooperate in managing the resources in a sustainable way.
- It provides for detailed specifications on delimitation and classification of waters, and sets up the International Tribunal for the Law of the Sea (ITLOS) to rule in disputes (if the parties do not instead choose the ICJ or arbitration as dispute settlement mechanisms).
(pp. 32-33)

…The creators of the UNCLOS have been wise in many a way. This is certainly true when it comes to the way in which they have tied delimitation and dispute settlement to rather static entities. **Dispute settlement in international treaties is usually contained within separate protocols. In the UNCLOS, however, it was incorporated in, and made a part of the treaty itself, thus making it compulsory for those party to the Convention to utilize its dispute settlement mechanism if/when disputes with other parties materialize**.

Second is **the negotiating principle that was adopted; consensus – as opposed to voting**. This is why negotiations took as long as nine years to conclude. **Tendencies of bloc voting had been evident for quite some time within the UN system, and to avoid that the NIEO-wind58 would paralyze the negotiations, the consensus principle was chosen**.

Another way in which they have been wise has been **to make the UNCLOS a package deal – meaning that it has been presented to the parties as a "yay or nay", leaving no room for individual amendments or reservations on specific articles of the treaty**. In this way they have attempted to overcome or alleviate a very typical procedural obstacle which often will change a treaty into becoming more of a lowest common denominator59.
(p. 34)

…***4.5 The American UNCLOS arguments conceptualized***

Rewind back to 2000/01.

The Clinton administration left office with the UNCLOS at the top of its list of unratified treaties119. According to John B. Bellinger III (2008)120, the Bush administration picked up on that designation, passed it around to the various departments and government agencies and concluded after a long review process to support accession121. And it did so with more or less the same points of justification as its predecessor and successor.
(p. 53)

…There are a myriad of more or less mythical conceptions about the potential impact of the UNCLOS on US interests, some more ludicrous than others.

I think it will be wise not to handle them in the manner which UNCLOS` most eager proponents or opponents do. It is too ideological a matter.

What is clear is that the UNCLOS touches on a wide range of US interests.

Neo-functionalist thinker Ernst B. Haas once summed up some of the issues pertaining to regulating the seas:

> *"fishing, mining, merchant shipping, pollution control, underwater communications, oceanographic research, innocent passage through territorial waters, recreation, maintenance of law and order, the peaceful settlement of disputes, conservation of all living resources of the sea, maritime safety and ownership of vessels, slavery, piracy, the drug traffic, the development and diffusion of new ocean-related technologies, the use of underwater nuclear explosions, arms control" (Haas in de Wilde 1991:14)*

These are *some* of the issues which ensure that ocean politics will be of the utmost strategic importance for the US.
(p. 54)

> *…"First, I urge the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress. Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural*

resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted" – Presidential Oceans Policy Statement May 15, 2007
(The White House 2007)

Bush seems to make clear the compelling points of justification. Ratifying the UNCLOS will strengthen national security, improve the military`s capability to project power globally, secure access to resources, promote ocean health and broad environmental concerns, and give the US a vote in debates, interpretations and dispute resolutions.
(pp. 54-55)

…*4.5.1 Creeping unqiueness*

Creeping uniqueness has become somewhat of a fashionable concept among the more intellectual of the UNCLOS skeptics and rears its face in the Passage dispute. The idea, of course, runs along the lines of; "because of some compelling local circumstance, normal rules do not apply".
(p. 55)

4.5.2 Sovereignty

This is how the most eager opponents of the UNCLOS view their battle. They allude to Jimmy Carter`s Panama Canal Treaty of September 1977125 and claim UNCLOS is an equally big "give-away" of US sovereignty126 and resources. It is not always easy to figure out the precise logic which underlines this view. **For some, it is the funding of the ISA (which is seen as a global tax), for some it is the mandatory dispute settlement mechanism and for some it is simply the mere idea of multilateralism. All are however seen as diminutions of sovereignty/autonomy**.
(pp. 56-57)

…*4.5.3 In dubio pro natura?*

Although there are problems with his general position133, I do believe that Lawrence A. Kogan hones in on something interesting when he speaks of a *legal competition* between the US and other nations (implicitly, this means Europe at large) of how to infer and interpret the core principles set forth both by the freedom of the seas doctrine and the environmental and economic provisions of the UNCLOS (Kogan 2009). The pivot, according to Kogan, is the so-called *precautionary principle134*, which he sees as a European entity that is permeating the UNCLOS and would considerably alter both US law and the manner in which the US deals with international law. Or rather; alter the legal norms with which the US is used to operating. The premise is, of course, that the US was to accede to the treaty.

Although it might seem to perplex him that the principle is seeping into the US, I do not believe this to be the case. Albeit it a rather new concept in US case law, the precautionary principle has been a talking point within environmental milieus since the early 1980s and really got a foothold through specific references in important environmental conferences a decade later135 and particularly with the newly conceived EU adopting it as a guiding principle. Although late to follow suit, the US now seems destined to have their legislation affected as well - as witnessed by the landmark 2003 decision of the city of San Francisco136 to have the principle underline all its environmental policies (City of San Francisco 2003).

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133 Which essentially is a not-so-well concealed intellectual defense of the American legal standard, to the disfavor of the European counterpart and, in this case, the UNCLOS itself. It

makes the case that the UNCLOS has got so far-reaching legal environmental consequences that the Senate must vet it and its consequences in a multi-committee fashion. In fact, March, April and May of 2004 saw the Senate Environment and Public Works Committee, the Senate Armed Service Committee and the House International Relations Committee all holding hearings on the UNCLOS.

134 From the original German phrase *Vorsorgeprinzip*. The precautionary principle is the legal (and moral and political) principle which states that when human activities may lead to morally unacceptable and/or irreversible harm (to the environment or human health) that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. It thus alters the burden of proof – placing it on the opposite side. **The precautionary principle closely borders other adjacent judicial norms, like sustainable development and earth jurisprudence**.

135 The most famous of which is probably the Rio Declaration of 1992 and its Principle 15 (Science & Environmental Health Network 2003)

136 Generalizing from famously liberal and progressive San Francisco alone is not entirely unproblematic. There are however heaps of other federal and state laws that are clearly precautionary in *intent*, if not in black letter, like The Clean Water Act (1972) or the Endangered Species Act (1973). The Food Quality and Protection Act (1996) is an example of one of the rather new laws which clearly possesses codified precautionary elements.

(p.60)

It, combined with other new legislation and an assumed US accession to the UNCLOS, would seem to prove that the legal competition is no more – if it ever was. Although most certainly not there yet, the US is moving toward making the precautionary principle the rule as supposed to the exception.
(pp. 60-61)

… One of the interesting aspects of the current UNCLOS debate in the US is the fact that it can no longer be analyzed within a straight forward partisan paradigm. This was more the case under President Reagan in the 1980s, where this and other issues seemed to take on a more ideological spin.

Nowadays it is different. With former President Bush, several of his top liaisons, vocal incumbent GOP senators like mrs. Murkowski, Dick Lugar, Ted Stevens and others in support of ratification, the Republican caucus is itself divided and **one has to look to the right fringe of the party to find the opponents in the likes of mr. Inhofe, mr. DeMint, mr. Vitter etc.**
(p. 62)

…7. Literature

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