

UNCLOS NEEDED FOR AMERICA'S SECURITY

WILLIAM D. BAUMGARTNER*

Accession to the Law of the Sea Convention¹ is a very important issue for this administration. Most of you have probably already heard or seen statements supporting accession by the President, senior Cabinet-level officials, our most senior military leaders—including my boss, Admiral Thad Allen, Commandant of the Coast Guard²—a host of former legal advisers for the Department of State, former Chiefs of Naval Operations, and former Commandants of the Coast Guard.³

I will tell you fairly simply, why I support accession, and that is because it helps me do my job. Why is that important? Well, that is because my job is to protect the safety and the security of the American public. That might be by interdicting potential terrorists, narcotics shipments, or migrants; by patrolling waters near where those threats emanate, be they off the coast of South America, the Persian Gulf, Africa, or elsewhere, in conjunction with our sister maritime services and the Air Force. It might also be by developing and deploying counterterrorism response capability; by promoting and operationalizing the Proliferation Security Initiative; by gathering and analyzing critical

* Rear Admiral, U.S. Coast Guard, Judge Advocate General. B.S. 1980, United States Coast Guard Academy; M.B.A. 1986, University of New Orleans; J.D. 1994, Harvard Law School.

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

2. See Statement by Admiral Thad Allen, Commandant of the Coast Guard, on the Convention on the Law of the Sea (May 21, 2007), <http://www.oceanlaw.org/index.php?name=News&file=article&sid=15> (last visited May 20, 2008) (urging U.S. accession to UNCLOS).

3. *The Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (2007) (statement of Adm. Patrick Walsh, Vice Chief of Naval Operations) (stating support for U.S. accession to the treaty); *The Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (2007) (statement of John Negroponte, Deputy Sec'y, Dep't of State) (testifying in support of U.S. accession). See also James D. Watkins & Leon E. Panetta, *Debating 'LOST'—Should the U.S. Ratify the Law of the Sea Treaty?* SAN DIEGO UNION-TRIB., Oct. 14, 2007, available at <http://www.oceanlaw.org/index.php?name=News&file=article&sid=60> (urging accession).

intelligence for the war on terror; by promoting and executing the President's national security strategy, as well as the President's national strategy for maritime security. I can protect the United States better if we accede to the Law of the Sea Convention.

It is also my job to protect our country's maritime economic interests. We have the largest exclusive economic zone of any nation.⁴ We have some of the world's most lucrative fishing grounds. Our economy, and even our daily creature comforts, are dependent upon commercial maritime trade. We have some of the world's most sensitive environmental areas. I can protect all of these interests better if the United States accedes to the Law of the Sea Convention.

As I make these remarks, I want to make sure that you understand where I am coming from. Yes, I am a lawyer now, the Coast Guard's Judge Advocate General Chief Counsel, but first and foremost in my DNA or my professional DNA, I am a Coast Guard line officer with firsthand experience as a boarding officer and a commanding officer of a Coast Guard cutter. I have arrested drug smugglers, personally seized tons of narcotics, and saved lives at sea.

When I complete my tour as a Judge Advocate General, I may very well follow in the footsteps of my predecessors in this job and become one of the Coast Guard's geographical operational commanders. In that position I will be personally responsible for protecting our citizens, our critical infrastructure, natural resources, and our economic interests. Thus, I am interested in far more than academic debates on this subject. I am interested in ensuring that my interagency partners and I at the Department of Defense, the Department of Justice, the State Department, the FBI, the intelligence community, and elsewhere are equipped with the best possible legal regime to protect our country, our people, and our economic interests.

United States accession to the Law of the Sea Convention is an absolutely vital component in this effort. The Convention is one of the most thoroughly examined and debated international

4. See USEEZ: Boundaries of the Exclusive Economic Zones of the United States and Territories, http://coastalmap.marine.usgs.gov/GISdata/basemaps/boundaries/eez/noaa/useez_noaa.htm#1 (last visited May 20, 2008) (noting that the U.S. zone, the largest in the world, contains 3.4 million square miles of ocean and 90,000 miles of coastline).

conventions in history. Even after all of this scrutiny there still are no good reasons to not accede to the treaty, and there are a multitude of reasons to accede. I will mention just a few of those. We will lock in important freedom-of-navigation rights and preserve the rights of our military to move freely throughout the world's oceans and airspace. This includes the right of innocent passage through territorial seas and the right of transit passage through straits used for international navigation, as well as through archipelagic sea lanes.⁵ Not only do our warships and military aircraft rely upon these freedoms daily, but those commercial vessels that resupply and refuel our troops do as well.

We will stabilize the outer permissible limit of the territorial sea of other nations at 12 nautical miles.⁶ We will gain the leverage to combat effectively excessive territorial sea claims and other excessive claims. At present, there are over a hundred excessive claims throughout the world.⁷ These are not just rogue states making these claims. Many, including those pertaining to the continental shelf, are from friendly nations or nations with whom we need principled, cooperative relationships. Our status as a nonparty to the Law of the Sea Convention hobbles our efforts to address these claims in an effective manner.

Specifically, I point out the counternarcotics area. There are excessive territorial sea claims that cause significant operational impediments for us on a daily basis. Our status as a nonparty makes it difficult for us to achieve effective operational agreements with those nations that have claims of territorial seas of up to two hundred nautical miles.

Now I cannot guarantee that the moment that we accede to the Law of the Sea Convention, these nations will drop their excessive claims. But I can assure you that as long as the United States refuses to accede to the Convention, these states are not likely to back off. You can imagine the futility of the argument that they should adhere to a provision in the Law of the Sea Convention that limits their territorial sea to 12 nautical miles

5. UNCLOS, *supra* note 1, art. 17, 1833 U.N.T.S. at 404; *id.* art. 38, 1833 U.N.T.S. at 411.

6. *Id.* art. 3, 1833 U.N.T.S. at 400.

7. Cf. J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 11 (U.S. Naval War Coll. Int'l L. Studs. No. 66, 1994) ("Since World War II, more than 80 coastal States have asserted various maritime claims that threaten the rights of other States to use the oceans.").

while, at the same time, the United States refuses to accede to that Convention.

We will reaffirm the sovereign immune status of our warships and our public vessels.⁸ We will secure sovereign rights over extensive offshore areas.⁹ In fact, we will gain more sovereign rights in terms of exclusive economic zones in the continental shelf areas than any other nation on the earth. We will gain access for businesses to deep-sea mining opportunities, including an internationally recognized system of property rights that will not be available to them unless we accede.¹⁰ Similarly, industries relying upon submarine cables, offshore oil and gas, and others will all benefit from United States accession to and support of the Convention.

There are numerous other examples of how the provisions of the Convention protect our economic, safety, and environmental interests, but I would quickly run out of time if I repeated all of them now. Still, I want to turn for a second to the cost of not being a party. With the rising terrorist threats from nonstate actors, the importance of the Law of the Sea Convention has steadily increased. We need cooperative partners in an understood framework in order to combat these threats. Leadership in this area is a central element of our strategy for national security and our national strategy for maritime security. We must be leaders in these areas to get the international regimes and conventions that we need to fight terrorists.

I have spent a significant amount of time in the last three years working on antiterrorism treaties, and our failure to accede to the Law of the Sea Convention is a continual impediment that we must repeatedly address. From firsthand experience, I can tell you that it is hard to argue for adherence to the rule of law when your country is not party to the primary Law of the Sea instrument.

Some have argued that we enjoy all of these freedoms and rights already, through customary international law and through the position that our nation has taken in recognizing much of

8. UNCLOS, *supra* note 1, arts. 32, 95, 96, 1833 U.N.T.S. at 409, 435.

9. *Id.* arts. 55, 77, 1833 U.N.T.S. at 418, 429.

10. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, § 5, July 28, 1994, S. Treaty Doc. No. 103-39, 1836 U.N.T.S. 41.

the Law of the Sea Convention as customary international law.¹¹ However, that is a path that is difficult, ineffective, and fraught with danger. Customary international law is ill defined. It is subject to change. Locking in favorable text in black and white is always preferable to relying upon understandings of customary international law.

As we come closer to the time when amendments to the Convention are contemplated, it is absolutely essential that we have a voice in that process. One of the basic principles I try to engrain in my officers is the idea that in any negotiation, the first person to get his ideas down in writing or, as we say, the first person to get the chalkboard, has a tremendous advantage. One forces others to work from one's own text and ideas. It is important to set the baseline and make others fight away from it. Well, I can say that I do not know how we can be first to the chalkboard if we do not even have a seat at the debate when these amendments come up, if they come up. In our current status as a nonparty, we will not be in the room. We will not have a seat, much less a voice.

Even decades ago, I do not think that this would have been an acceptable position for the United States, given our historic reliance on global and maritime commerce. Today, it is completely unacceptable. Ostriches, as they say, may bury their heads in the sand, but they are on land; they are not dependent upon water in a global maritime regime. On the other hand, if we try to bury our head and go it alone in our modern global maritime climate, we will drown.

Even before these amendments are considered, decisions are being made today by the Continental Shelf Commission.¹² These decisions will establish nations' rights to important resources between two hundred and three hundred fifty nautical miles off

11. See, e.g., *The Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 5 (2007) (statement of Fred Smith, President, Competitive Enter. Inst.), *available at* <http://foreign.senate.gov/testimony/2007/SmithTestimony071004.pdf> ("As noted, the treaty's best provisions—those concerning navigation—largely codify existing customary international law.").

12. See Div. for Ocean Affairs and the Law of the Sea, United Nations Office of Legal Affairs, Commission on the Limits of the Continental Shelf (CLCS): Purpose, Functions and Sessions, http://www.un.org/Depts/los/clcs_new/commission_purpose.htm (last visited May 20, 2008) (proclaiming as the commission's purpose "to facilitate the implementation of [UNCLOS] in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles").

their coasts.¹³ As a nonparty, the United States does not participate and cannot influence these results. Instead, again, we are mere bystanders.

There is an item to which I want to return that I mentioned earlier in my remarks, and this is the Proliferation Security Initiative (PSI).¹⁴ I have had some experience with the PSI. In fact, as Judge Advocate General of the Coast Guard, I am largely responsible for the execution of seven international maritime bilateral agreements on the Proliferation Security Initiative.¹⁵ I have to say that I have heard some arguments that PSI and the Convention are incompatible.¹⁶

Well, I have heard those arguments in the past, and it is strange enough that most of the time when I hear that PSI and the Law of the Sea Convention are incompatible, I am hearing this from opponents of PSI trying to convince nations out there not to join PSI.¹⁷ And frankly, I am a little surprised to see these arguments coming from supporters of PSI and from Americans as well. I know that those people are not trying to torpedo the PSI, but perhaps they just do not understand thoroughly what the PSI is about.

PSI is explicitly based on, and requires partner nations to act consistently with, national legal authorities and relevant international law frameworks.¹⁸ That is the heart of PSI. It allows

13. UNCLOS, *supra* note 1, art. 76(5), 1833 U.N.T.S. at 429.

14. The Proliferation Security Initiative (PSI), announced by President Bush on May 31, 2003, is an international effort to prevent and intercept the movement of weapons of mass destruction, delivery systems, and related materials. U.S. Dep't of State, Proliferation Security Initiative, <http://www.state.gov/t/isn/c10390.htm> (last visited May 20, 2008).

15. These bilateral agreements establish procedures for boarding and searching ships in international waters. As of Oct. 23, 2007, there are now eight such agreements. See U.S. Dep't of State, Ship Boarding Agreements, <http://www.state.gov/t/isn/c12386.htm> (last visited May 20, 2008) (providing the text of each agreement).

16. See, e.g., *The Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 14–15 (2002) (statement of Frank J. Gaffney Jr., President and C.E.O., The Ctr. for Sec. Pol'y), available at <http://foreign.senate.gov/testimony/2007/GaffneyTestimony071004.pdf> (arguing that Article 110 of UNCLOS would severely restrict the ability of PSI members to board and search ships in international waters).

17. See, e.g., G.S. Khurana, *Proliferation Security Initiative: An Assessment*, 28 STRATEGIC ANALYSIS 239–41 (2004) (arguing that the PSI is illegal under UNCLOS provisions limiting the circumstances under which ships can be boarded).

18. See Proliferation Security Initiative, *supra* note 14 (“The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes.”); U.S. Dep't of State, Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003), <http://www.state.gov/t/isn/rls/fs/23764.htm>

us to bring together a whole host of partners, authorities, and jurisdictions to work cooperatively. Virtually all of our partners in PSI are parties to the Law of the Sea Convention.¹⁹ Clearly, they see no conflict.

Far from impeding PSI, if we accede to the Law of the Sea Convention, it will help our PSI efforts. It will remove the invalid, incorrect, bogus argument that PSI is a renegade regime that flies in the face of international law.²⁰ The result, if we accede, is that there will be more partners, more intelligence, and more preemptive actions that will help to protect us from serious and significant threats.

As I said at the beginning, my job is to protect the safety and security of the American public. Acceding to the Law of the Sea Convention will help me, my fellow military services, our interagency partners, and our international allies to do just that.

(last visited May 20, 2008) (stating that the PSI will operate “consistent with national legal authorities and relevant international law and frameworks”).

19. See U.S. Dep’t of State, Proliferation Security Initiative Participants, <http://www.state.gov/t/isn/c19310.htm> (last visited May 20, 2008) (listing 86 participating countries as of Nov. 9, 2007).

20. See, e.g., Frank J. Gaffney Jr., *John Kerry’s Treaty: Outsourcing Sovereignty*, NATIONAL REVIEW ONLINE, Feb. 6, 2004, <http://www.nationalreview.com/gaffney/gaffney200402261356.asp> (arguing “the sorts of at-sea interdiction efforts central to President Bush’s new Proliferation Security Initiative (PSI) would be prohibited” under UNCLOS). For a more thoughtful discussion of potential areas for improvement in the PSI legal framework, see Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L.J. 131, 219 (2005) (supporting the goals of the PSI but recognizing that it stands on a shaky legal footing, and recommending that PSI participants pursue various legal strategies, such as obtaining a new U.N. Security Council resolution that would explicitly authorize high-seas interdiction), and Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT’L L. & P. 253, 269–72 (2005) (discussing potential conflicts between the PSI and UNCLOS, and suggesting various legal solutions).