U.N.'S LARGER ROLE IN UNCLOS IS BAD FOR AMERICAN INTERESTS

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I will confine myself in trying to address several of the points that have been made by the proponents of the treaty that I find, frankly, inadequate, if not misleading. And I am struck by John Moore's comments at the outset[1]—meant, I am sure, in a generous way—about my role and Baker Spring's role on behalf of missile defense. I appreciate it. John has been helpful in that long-running saga to try to prevent this country from remaining vulnerable to attack by ballistic missiles from all quarters.[2]

But I can assure all, there was a time when the entire national security establishment, when the industries affected, when the international community, and most especially, of course, the people who are unfriendly to the United States, were determined to prevent the United States from having a missile defense. I feel no more isolated today in making arguments, that I find compelling, against this treaty than I did making arguments for defending the United States against missile attack in the face of that seemingly overwhelming preponderance of wisdom.[3] I am sorry that John was with me in that fight and I find him against me in this one, but so be it.

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1. John Norton Moore, *UNCLOS Key to Increasing Navigational Freedom*, 12 TEX. REV. L. & POL. 459, 459 (2008).

2. *See* JOHN NORTON MOORE, THE NATIONAL LAW OF TREATY IMPLEMENTATION v (2001) (noting that in 1989, Moore completed a multi-volume, 4000-page study, which remains classified, on whether and to what extent research into missile defense technologies could be conducted within the limits of the Anti-Ballistic Missile (ABM) Treaty). *See generally id.* (presenting unclassified portions of the same study and analyzing legal and constitutional issues relevant to the interpretation of the ABM Treaty).

3. *See, e.g.*, *Ballistic Missile Defense: Responding to the Current Ballistic Missile Threat: Hearing Before the Subcomm. on Nat'l Sec., Int'l Affairs, and Criminal Justice of the H. Comm. on Gov't Reform and Oversight*, 104th Cong. 66–82 (1996) (testimony of Frank J. Gaffney Jr., Director, Ctr. for Sec. Pol'y) (arguing for defending the United States against missile attack).

Let me start by talking about the military interests in this treaty and the enthusiasm from Rear Admiral Baumgartner.[4] I commend him for his service, and I hope he is right that he will go on to be, once again, an operator and not simply a lawyer. I think it will bear greatly on his future ability to conduct its operations, if we find ourselves subjected to the constraints that this treaty will involve. You do not have to look beyond some of the stated commitments of this treaty to anticipate constraints.

I suggest, for example, Article 88, which obligates the parties to the treaty to the peaceful uses of the seas;[5] Articles 19 and 20, which refer to certain practices like intelligence collection and operations undersea that are restricted in territorial waters if one wishes to be construed as having the peaceful intent to which each is obligated;[6] Article 144, which talks about the transfer of strategically sensitive technology;[7] Article 110, which, I think, will complicate the Proliferation Security Initiative;[8] and Article 301, which is sort of a catch-all that prohibits the threat of the use of force against territorial integrity or the political independence of any state.[9]

Now, one may argue that none of that applies to the United States because, of course, military activities are excluded from this treaty, and it will be up to us to determine what military activities are.[10] I say, maybe. I think if one were a conservative, one would take those assurances with a grain of salt. How many treaties have we seen in which hortatory language—not even binding texts of treaties, but introductory material—is cited as an obligation, for example, for the United States to denuclearize

4. William D. Baumgartner, *UNCLOS Needed for America's Security*, 12 TEX. REV. L. & POL. 445 (2008).

5. *See* United Nations Convention on the Law of the Sea, art. 88, Dec. 10, 1982, 1833 U.N.T.S. 396, 433 [hereinafter UNCLOS] ("The high seas shall be reserved for peaceful purposes.").

6. *Id.* arts. 19–20, 1833 U.N.T.S. at 404–05.

7. *Id.* art. 144, 1833 U.N.T.S. at 449.

8. *See id.* art. 110, 1833 U.N.T.S. at 438–39 (prohibiting the boarding and searching of ships except where reasonably suspected that the ship is engaged in piracy, the slave trade, or unauthorized broadcasting, the ship is without nationality, or the ship is of the same nationality as the boarding warship).

9. *Id.* art. 301, 1833 U.N.T.S. at 516.

10. *See id.* art. 298(1)(b), 1833 U.N.T.S. at 515 (allowing a member state to declare that it will opt out of the Convention's dispute resolution procedures for disputes related to military or law-enforcement activities).

itself?[11] I personally have been subjected to this endlessly, and I suspect other conservatives have as well.

The charge has been made that this is a modest treaty, and we have not had any problem with people trying to use it to interfere with the use of our military and its mobility around the world, because it has not happened yet. This minor staff, this innocuous multilateral organization, is so inconsequential as to be of no concern in any of these respects. I must say again, that may be true today. In fact, it is not entirely surprising that it is true today since I believe that everyone who wishes to use this treaty against us has understood that they need to get us into the treaty before they start doing that, or else we will not get into the treaty.

Now, does that sound conspiratorial? Well, again, I think if you are a conservative, the old adage "just because you're paranoid doesn't mean they're not out to get you" applies. We need to be suspicious, especially when dealing with the U.N. or agencies like the U.N., to say nothing of an organization that was crafted by a majority that was determined to create supra-national organizations to run two-thirds of the world; that is to say, the two-thirds of the planet that is covered by international waters.

Let me give you an example of the problem of whether a military activity is in fact excluded or not. Let us take a military capability that those in Uniform, and the Admiral here, will be very familiar with: SONAR. SONAR is a piece of equipment that is becoming, if anything, infinitely more important to our naval forces, as the proliferation of what could be weapons of mass destruction, though we never think of them as such, occurs all

11. *See, e.g.*, ARJUN MAKHIJANI & NICOLE DELLER, INST. FOR ENERGY & ENVTL. RESEARCH, NATO AND NUCLEAR DISARMAMENT: AN ANALYSIS OF THE OBLIGATIONS OF THE NATO ALLIES OF THE UNITED STATES UNDER THE NUCLEAR NON-PROLIFERATION TREATY AND THE COMPREHENSIVE TEST BAN TREATY 12–15 (2003), *available at* http://www.ieer.org/reports/nato/fullrpt.pdf (arguing, based on aspirational language in the Non-Proliferation Treaty, that the United States and its allies are obligated to move toward complete nuclear disarmament); Eric M. Fersht, Note, *Litigating for Nuclear Nonproliferation: Legal Claims in U.S. Federal Courts to Seek Suspension, Modification, or Termination of the United States–Japan Nuclear Cooperation Agreement*, 6 GEO INT'L ENVTL. L. REV. 503 (1994) (advocating litigation in U.S. federal court to challenge U.S.–Japan nuclear cooperation programs based on the Non-Proliferation Treaty). *Cf.* Emily K. Penney, *Is That Legal? The United States' Unilateral Withdrawal from the Anti-Ballistic Missile Treaty*, 51 CATH. U. L. REV. 1287 (2002) (arguing that—despite the fact that the treaty itself explicitly allowed for unilateral withdrawal—the Bush Administration's withdrawal from the ABM treaty violated customary international law).

over the world—namely, the proliferation of very quiet submarines. Since the Navy and the Coast Guard have largely been reliant upon acoustic technologies to detect, track, and defeat enemy submarines, we have needed more powerful SONARs to contend with these new quiet submarines. More powerful SONARs, some people believe, are bad for dolphins and whales and other living creatures.[12] When they do nasty things to those creatures, if in fact they do, it is an environmental impact, not a military technology. And if you think that is my say-so, look at what federal judges are starting to say.[13] And that is without the benefit of the International Law of the Sea Tribunal, which you can be sure will have a view on this subject that is not consistent with that of the United States military.[14]

Let us, for the purposes of discussion, stipulate that none of the things I have just described are in fact as problematic as I believe they will be. And that this is the wonderful treaty that the United States military today is convinced it is. There is the sixty percent of the treaty that most of the sales people for this treaty would prefer to ignore, which had nothing to do with navigation rights and yet are going to be very serious problems for this country. And I think not just conservatives, but people who love our sovereignty, of all political stripes, should be very concerned about them.

Let me just touch on a couple of examples. I mentioned the Law of the Sea Tribunal. The Law of the Sea Tribunal has wide-

12. *See, e.g.*, Marsha L. Green, Ph.D., Talk at the ASMS Whale Zone Symposium: LFA Sonar: Is it Worth the Risk? (July 7, 2002), *available at* http://www.oceanmammalinst.org/zurich-lfa-address.htm (arguing that new sonar technology threatens marine life, and claiming that Navy sonar testing violates "the Precautionary Principle which has become a binding norm of customary international law under the U.N. Law of the Sea").

13. *See, e.g.*, Cetacean Cmty. v. Bush, 386 F.3d 1169, 1172 (9th Cir. 2004) ("The negative effects of underwater noise on marine life are well recognized."); Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1138 (N.D. Cal. 2003) ("[T]here can also be no doubt that the public interest in protecting the world's oceans and the sea creatures that depend upon the oceanic environment to survive is also of the highest importance."); Natural Res. Def. Council, Inc. v. Evans, 232 F. Supp. 2d 1003, 1012–13 (N.D. Cal. 2002) (granting a "carefully tailored" preliminary injunction that required the Navy to adjust its sonar testing and training "to reduce the risk to marine animals and endangered species"). *See generally* Daniel Inkelas, *Security, Sound, and Cetaceans: Legal Challenges to Low Frequency Active Sonar Under U.S. and International Environmental Law*, 37 GEO. WASH. INT'L L. REV. 207 (2005) (discussing legal challenges to sonar testing).

14. *See infra* notes 14–15 and accompanying text.

ranging authority to determine what its mandate is.[15] It has, in fact, exercised it recently to determine that it extends to the land, in connection with a suit brought by the Irish government against the British government about a nuclear facility on British soil.[16] Since waters run from the land to the sea, it is not an implausible claim. And you can bet it will be used against this country when our waters are seen by the environmentalists here and abroad as contaminating international waters. Is that something conservatives should be concerned about? I submit it is.

How about taxing authority? This will be the first time that an international organization has explicitly been given the ability to raise revenues.[17] Now John Moore will quibble, I suspect based on past experience with him, that this is not really a tax. These are fees; these are tithings of some kind, permitting obligations.[18] Whatever its name; we would begiving to a U.N. organization the ability to raise its own revenues.

And this is going to have precedential implications, especially at a moment when the U.N. is angling to try to find other ways to raise revenues, starting with airline taxes that are already being imposed by some in order to pay for unobjectionable things like AIDS and tuberculosis and other medical treatments through U.N. facilities.[19] That is something conservatives should be concerned about, especially since it ensures that the U.N. will be even less accountable than it is today when it relies on us for a quarter of its funding.

I mentioned this environmental problem. This is a backdoor Kyoto. In fact, it is worse than Kyoto. Is that something

15. *See* UNCLOS, *supra* note 5, Annex VI, art. 21, 1833 U.N.T.S. at 566 ("The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."). *See generally* International Tribunal for the Law of the Sea, http://www.itlos.org (last visited May 20, 2008).

16. *See* The Mox Plant Case (Ireland v. United Kingdom), 2001 ITLOS Case No. 10, Order, at 13, para. 1 (Int'l Trib. L. of the Sea, Dec. 3, 2001), *available at* http://www.itlos.org/case_documents/2001/document_en_197.pdf (directing the U.N.ited Kingdom to "devise . . . measures to prevent pollution of the marine environment which might result from the operation of the MOX plant").

17. *See* UNCLOS, *supra* note 5, art. 82, 1833 U.N.T.S. at 431 (requiring annual payments from coastal states and redistributing the payments among all State Parties to the Convention based on equitable sharing criteria).

18. Moore, *supra* note 1, at 466–67 & n.29–31.

19. Maggie Farley, *14 Nations Will Adopt Airline Tax to Pay for AIDS Drugs*, L.A. TIMES, June 3, 2006, at A14.

conservatives should be concerned about, since, in practice, it will be internationally enforced? And can it become worse? You heard by implication an acknowledgment that of course it can become worse, in all of these respects—the navigation part that the Navy and the Coast Guard are so hot about. They want to be at the table, because they know that this treaty is going to become worse.[20] They would have you believe they will be able to prevent it by being at the table. I submit to you, that is not necessarily the case and almost certainly will not be the case because, again, the U.N. majority does not have much use for us. That majority was responsible for creating the present Law of the Sea Treaty, a treaty that, yes, has navigation provisions but also has supra-national government, with an executive, with a legislature, with a judiciary, that might be a microcosm today.[21] It can only grow as it gains revenues, as it gains the authority to rule over, let us say for the purposes of discussion, just the international mining provisions of the seabed—until of course it is amended or until the judicial branch of this operation extends its reach further.

Should conservatives be concerned about that? I suggest that they should. How about the idea that this will serve, as its framers intended, as a precedent for the management of other "international commons"?[22] How about space, an international commons if ever there was one?[23] How about we need a mechanism very much like this, with an executive, with a legislative, with a judicial branch, to determine what is a permissible use of space and what is not? Perhaps you will start, as is happening today, with discussions about what they call "rules of the road" in space,[24] rules of the road which will almost

20. Baumgartner, *supra* note 4, at 449 & n.11.

21. *Cf.* William P. Clark & Edwin Meese, *Reagan and the Law of the Sea*, WALL ST. J., Oct. 8, 2007, at A19 (describing Part XI of UNCLOS as creating "a variety of executive, legislative mechanisms to control the resources of the world's oceans").

22. *See, e.g.*, PETER J. BECK, THE INTERNATIONAL POLITICS OF ANTARCTICA 115 (1986) (discussing proposals to replace the Antarctic Treaty with a United Nations organization modeled after UNCLOS).

23. *See* Posting of Travis Hodgkins to Transnational Law Blog, *Today, The Arctic Sea—Tomorrow, The Moon*, (Dec. 3, 2007, 22:13 EST), http://transnationallawblog.typepad.com/transnational_law_blog/2007/12/arctic_moon.html (suggesting that the role of UNCLOS in current disputes over sovereignty in the Arctic Ocean could provide a model for handling future conflicts over the Moon).

24. *See, e.g.*, Peter N. Spotts, *Does Space Need Air Traffic Control?: As More Countries Race to Launch Satellites and Manned Aircraft, Some Warn of a Space Jam,* CHRISTIAN SCI. MONITOR, Mar. 14, 2008, § 2, at 1, *available at* http://www.csmonitor.com/2008/0314/p01s02-usgn.html (last visited May 20, 2008)

certainly wind up, as these things typically do, impinging upon U.S. interests—certainly our freedom of action, and I would argue our sovereignty—at our expense, not the expense of others. Others will, as they always do, ignore things that are inconvenient to them. Should that be of concern, a precedent like this? I suggest it should.

Where does that leave us? I suggest again that one of the things that conservatives should be most concerned about is that a Bush administration, which, I am sorry to say, in its latter days now has ceased in most respects to have much resemblance to conservatives and certainly ceased much affinity for its base, is pursuing in other areas, like immigration, an attitude that can only be described as rather indifferent to our sovereignty and is now championing a treaty that I believe will be extremely harmful to our sovereignty.

I shall just give one example to rebut what John Moore said, which is to say that this is the greatest thing that has ever happened to our sovereignty.[25] Think about this: New Orleans today is a city that can be occupied by at least some of its population because we did something in the aftermath of Katrina that we may well have to do again if, unfortunately, another hurricane does to New Orleans what the last one did. We dumped incalculable quantities of highly toxic waste into international waters.[26]

That was an act of sovereignty. It required us to waive domestic environmental law in order to do it, and I must tell you, I find it unimaginable that were we a party to this treaty, we would be able to do that. Certainly we would not be able to dump toxic waste without being sued.[27] Furthermore, with the Supreme Court agreeing now that international tribunals and

(describing calls for "an international body similar to the International Civil Aviation Organization" to manage activity in low Earth orbit).

25. Moore, *supra* note 1, at 466 & n.26–28.

26. *See generally* JAMES E. MCCARTHY & CLAUDIA COPELAND, CONGRESSIONAL RESEARCH SERVICE, EMERGENCY WAIVER OF EPA REGULATIONS: AUTHORITIES AND LEGISLATIVE PROPOSALS IN THE AFTERMATH OF HURRICANE KATRINA (2005) (analyzing various proposals to relax environmental laws and regulations in connection with the post-Katrina cleanup).

27. *Cf.* Andrew L. Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, 33 ENVTL. L. REP. 10185, 10188 (2003) (proposing litigation against the United States under UNCLOS on the theory that greenhouse gas emissions contribute to "pollution of the marine environment" as defined in the Convention, and arguing that the United States is bound by UNCLOS even though it is not a signatory).

their rulings and other findings can trump our domestic jurisprudence,[28] those injunctions will be enforced. I submit that is something that conservatives should also be concerned about, and we should remain firmly in opposition to this Treaty.

28. *E.g.*, Roper v Simmons, 543 U.S. 551, 575–78 (2005).