



Will Our Freedoms Be LOST at Sea?

The Obama administration is pulling out all the stops in an effort to get the Senate to ratify the United Nations Convention on the Law of the Sea (UNCLOS), also known as the Law of the Sea Treaty (LOST). The administration argues that the treaty offers the United States great benefits at no cost. LOST opponents maintain that the accord's few benefits — most of which are already enshrined in international law — are dwarfed by its price: granting an unaccountable, UN-created body control over 70 percent of the Earth's surface.



LOST and Found

Barack Obama set up housekeeping at 1600 Pennsylvania Avenue determined to see LOST ratification through. As a candidate for President, Obama told the American Society of International Law that LOST was “clearly in the national interest” and that he would make it his “priority to build bipartisan consensus behind ratification” of it. As President, he has surrounded himself with LOST supporters, among them Vice President Joseph Biden, Secretary of State Hillary Clinton, and Secretary of Defense Leon Panetta.

The administration put LOST on the back burner for a while; but in 2011, it began pushing for ratification, aided by Sen. John Kerry (D-Mass.), Chairman of the Senate Foreign Relations Committee, who started meeting with his fellow Senators to convince them to support the treaty. However, he did not schedule a committee hearing until May 2012. Capitol Hill staffers told *Foreign Policy* magazine that Kerry delayed the hearing to assist his Republican counterpart on the committee and fellow LOST cheerleader, Sen. Richard Lugar of Indiana, in his primary election battle against Tea Party-backed Richard Mourdock. Lugar lost just the same, but he is now free to back LOST to the hilt without fear of voters' wrath. (A Kerry spokeswoman denied the Lugar angle, stating that the hearing had been delayed because of Kerry's service on the deficit supercommittee and more urgent matters before the Foreign Relations Committee.)

The May 23 hearing demonstrated the administration's determination to move LOST through the Senate as quickly as possible. Clinton, Panetta, and Joint Chiefs of Staff Chairman Gen. Martin Dempsey, three of Obama's heaviest hitters, all made impassioned pleas for the Senate to accede to LOST — the sooner, the better.

“I strongly believe that accession to this treaty is absolutely essential, not only to our economic interests, our diplomatic interests, but I'm here to say that it is extremely important to our national security interests as well,” Panetta told the committee.

Dempsey, too, approached LOST from a national-security angle, saying that “being a member of the Convention would better allow the United States to exercise global security leadership.” He argued that accession to the accord “would provide legal certainty to our navigational freedoms and legitimacy to our maritime operations that customary law simply cannot.” In addition, he said, the United States



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becoming a party to LOST would enable it to counter “illegitimate expansionism” by foreign countries.

(Panetta and Dempsey had offered similar remarks at the Law of the Sea Convention forum in Washington a fortnight earlier, again proving how serious the administration is about LOST.)

Of the three, Clinton offered the most comprehensive defense of LOST.

“As the world’s foremost maritime power,” she remarked, “the United States benefits from the Convention’s favorable freedom of navigation provisions.” Though the U.S. military currently has freedom of the seas, such freedom is based on custom combined with military might. Commercial shipping is likewise at the mercy of informal customs rather than formal law. Ratifying LOST would codify the customs of international law and secure U.S. navigational freedoms in perpetuity, benefiting both the armed forces and the private sector, she argued.

“We have the world’s second longest coastline,” Clinton said, “so the United States benefits greatly from the Convention’s favorable provisions on offshore natural resources.” In particular, LOST grants to each coastal nation an “exclusive economic zone”: Within 200 miles of its coastline the country has the sole right to determine who may extract natural resources and under what conditions. In some instances this “continental shelf” may be extended even farther — potentially as far as 600 miles off the northern coast of Alaska, she claimed.

“American companies are equipped and ready to engage in deep seabed mining,” the Secretary averred. “But the United States can only take advantage of the Convention’s provisions that accord security of tenure to mine sites in areas beyond national jurisdiction as a party to this treaty.” There are no customs governing mining in international waters, she said, “and without such security of tenure, industry has told us that it will not risk the significant investment needed to extract these valuable resources.” As long as the United States remains a non-party to LOST, she argued, America will lose out to other countries that are already staking their claims to mining sites under the treaty.

Joining the chorus of Panetta and Dempsey, Clinton maintained that ratifying LOST would enable the United States “to challenge other countries’ behavior on the firmest and most persuasive legal footing.”

Finally, she stated that the United States must accede to LOST in order to “steer its implementation.” Failure to join the Convention means that other countries, not the United States, will make the rules pursuant to the treaty — rules that Clinton said “could create precedents, positive and negative,” for the United States. “We need to be on the inside to protect and advance our interests,” she declared.

Having laid out the case for LOST ratification, Clinton then took aim at opponents of U.S. accession, saying their opposition is “based in ideology and mythology, not in facts, evidence, or the consequences of our continuing failure to accede to the treaty.”

As we shall see, however, many of the “facts” cited by LOST supporters are not quite as factual as they would have us believe; and the consequences of acceding to the treaty are far worse than the consequences of not doing so.

Socialism on the High Seas

LOST, wrote Jeremy Rabkin of the Competitive Enterprise Institute, “was largely drafted in the late 1970s, a period in which the then-new Third World majority in the U.N. General Assembly sought to recast international law to impose vast transfers of wealth from affluent to less-developed nations.... In its basic framework and underlying premises, it is a monument to the failed socialist thinking of a bygone era.”



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One needn't dig too far into LOST to see that Rabkin's assertions are accurate. The treaty's preamble declares that "the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States."

"The notion that the oceans or space are the 'common heritage of mankind' was — and is — a dramatic departure from traditional Western conceptions of private property," Jeane Kirkpatrick, President Ronald Reagan's UN Ambassador at the time LOST was completed (1982), told the Senate Armed Services Committee in 1994. "Most members at upper levels of the Reagan Administration were reluctant to put our foot on that slippery slope."

The Reagan administration also opposed LOST ratification for other reasons, such as the treaty's dubious constitutionality and its potential erosion of U.S. sovereignty. As a result, though 161 other countries and the European Union have ratified the pact, the United States remains the most significant holdout — and with good reason.

LOST, Kirkpatrick told the committee,

establishes a sweeping claim of jurisdiction over the seabed and all its mineral wealth. It creates an International Seabed Authority in which it vests control of two thirds of the Earth's surface. Under the LOS Treaty the power of the Seabed Authority would be vested in an Assembly made up of all participating states and an Executive Council of 36 members elected by the Assembly to represent investors, consumers, exporters of affected minerals, developing states, and all the geographical areas of the world. The formula for representation guaranteed that the industrialized "producer" countries would be a permanent minority. And they would have a majority of obligations. Most importantly, votes of the Assembly would be on the basis of one vote/one country, with a two-thirds majority binding on all parties.

The UN itself admitted how radical LOST is in a document celebrating the 25th anniversary of the treaty's completion:

The United Nations Convention on the Law of the Sea ... is perhaps one of the most significant but less recognized 20th century accomplishments in the arena of international law.... Its scope is vast: it covers all ocean space, with all its uses, including navigation and overflight; all uses of all its resources, living and non-living, on the high seas, on the ocean floor and beneath, on the continental shelf and in the territorial seas; the protection of the marine environment; and basic law and order.... The Convention is widely recognized by the international community as the legal framework within which all activities in the oceans and the seas must be carried out.

LOST, therefore, is clearly not some bland international agreement on navigational rights and deep-sea mining rules but an attempt by the UN to assume control "over everything, over, on, in, and under the oceans and seas of the world," in the words of Larry Greenley, director of missions for The John Birch Society. Yet according to pro-LOST forces, the treaty's critics, not its proponents, are the real radicals!

Sovereignty at Stake

What are the critics saying? For one thing, they are extremely concerned that LOST would jeopardize U.S. sovereignty, subordinating America to the will of all the other parties to the treaty, many of which are governed by corrupt, anti-American regimes.



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LOST supporters claim that this fear is unfounded because the United States has been granted a “permanent veto” over the actions of the International Seabed Authority (ISA) much like the one it possesses over the actions of the UN Security Council.

Greenley called this assertion an “exaggeration,” and he would certainly appear to be correct. First of all, this so-called veto only applies to the distribution of royalties from undersea mining and drilling under Article 82 of the treaty. Second, the ISA Assembly makes all decisions regarding the disposition of such revenue; and there the United States, while footing one-fourth of the ISA’s budget, would have just one vote out of 163. According to the Heritage Foundation’s Steven Groves:

Some UNCLOS proponents maintain that the United States, if it joined the convention, would have a “veto” over such decisions because the U.S. would hold a permanent seat on the 36-member Council, which is the executive organ of the Authority. In fact, UNCLOS empowers the Council only to make recommendations to the Assembly on the disposition of Article 82 revenue, which the Assembly may approve or disapprove. Any Council recommendation that is disapproved by the Assembly is returned to the Council “for reconsideration in the light of the views expressed by the Assembly.” Therefore, in function and form, the Assembly makes final determinations regarding the disposition of Article 82 revenue....

By virtue of its seat on the Council, the United States might be able to hinder decisions to distribute Article 82 revenue for purposes to which it objects. Whether the United States would be steadfast in its objections to such distributions and whether the Assembly would make any such distributions without the consent of the Council are open questions.

Of course, even if the United States did, in fact, possess precisely the same kind of veto in the ISA that it does in the Security Council, it would, Greenley remarked, offer “scant comfort when our U.S. Executive Branch usually sides more with the interests of the UN than with the national interests of the United States.”

LOST contains provisions establishing “institutions with executive and judicial powers that in some instances are compulsory,” William J. Middendorf II, former Secretary of the Navy and former Ambassador to the Netherlands and the Organization of American States, told the Senate Armed Services Committee in 1994. By putting the entire marine area under the thumb of the ISA, Middendorf said, the treaty grants “executive powers to the authority that supersed[e] the sovereign power of the participating states.”

“Of even greater concern,” Middendorf continued, “Part XV of the Convention establishes dispute settlement procedures that are quasi-judicial and mandatory. Once drawn into this dispute settlement process, it will be very difficult for the U.S. [to] extricate itself from it.”

How might these powers be used to thwart American interests? The possibilities are endless, but LOST opponents have cited several ways in which the treaty could threaten the United States.

First, they suggest that the other parties to LOST could well interpret the treaty in such a way as to interfere with U.S. military and intelligence activities.

A 2007 Heritage Foundation WebMemo stated that under LOST, “the U.S. would sign away its ability to collect intelligence vital for American security within the ‘territorial waters’ of any other country.” “Furthermore,” continued the WebMemo, “U.S. submarines would be required to travel on the surface and show their flags while sailing within territorial waters.”



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LOST also creates the International Tribunal for the Law of the Sea (ITLOS), whose job it is to adjudicate disputes between parties to the treaty. If, having joined LOST, the United States were to board and seize a ship on the high seas under the belief that it was being used to stage a terrorist attack against American interests, the state under whose flag the ship was sailing could appeal to ITLOS.

ITLOS might or might not choose to adjudicate the dispute. The language in the treaty purportedly exempts military activities from ITLOS's compulsory arbitration process; but it is vague enough, says Rabkin, that "the only thing certain is that it will be up to ITLOS to decide how far it wants to intrude into U.S. naval strategy."

U.S. participation in LOST would also narrow Washington's options for adjudicating disputes over seizures of U.S. ships. A LOST party that seized an American ship could demand that ITLOS settle the dispute, leaving the United States essentially powerless to settle it in any other way, even if ITLOS ruled against America.

The External Revenue Service

Second, say LOST critics, the treaty gives the ISA the authority to collect taxes on a global scale. Clinton hotly denied this, telling the Foreign Relations Committee, "There are no taxes on any individuals, corporations, or anyone else under the Convention."

The Secretary's claim is true in the same sense that her husband's assertion that he "did not have sexual relations with that woman" was true, i.e., only by defining the term as narrowly as possible.

The ISA is authorized to collect royalties from oil and gas exploration on a nation's continental shelf beyond 200 miles from shore. In the case of the United States, those royalties currently go the U.S. Treasury; under LOST, a portion of them would be forfeited to the ISA. "Starting in the 12th year of production, about ½ of the revenue that would otherwise go to the U.S. Treasury would instead be sent to the authority," according to Groves. That could amount to "billions, if not trillions of dollars," the U.S. Extended Continental Shelf Task Force estimated.

Deep seabed mining in international waters also generates revenue for the ISA and another UN entity known as the Enterprise. A LOST party-based company wishing to explore a particular site for minerals must pay the ISA \$250,000 for the privilege — and then hope that the Council approves its application. Furthermore, it must tell the ISA of a second, similar location that also has profit potential. The authority will then decide which site to exploit for itself and which one to let the private company mine. The company will have to pay a hefty annual fee to continue mining and share its profits with the Enterprise.

This all amounts to a forcible taking of wealth from producers the world over — which is to say it is a global tax.

And what does the ISA do with all these simoleons? It redistributes them to "developing" countries. After that, wrote Groves,

UNCLOS is silent on how UNCLOS nations that receive Article 82 royalty revenue should spend it. UNCLOS does not require recipient nations to spend the revenue on anything related to the oceans or the maritime environment. Nor does it require them 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. Recipients are apparently free to spend the funds on military



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expenditures or simply deposit them into the personal bank accounts of national leaders.

In addition to the revenue it will generate, the ISA's permit process has come under fire for its provisions regarding trade secrets and intellectual property. A company obtaining permission from the ISA to mine the ocean floor could be forced to turn over its new technologies to the Enterprise for a pittance, whereupon the technology could be shared with all other parties to LOST.

This also has national-security implications. While technology that is strictly for military use is exempted from this provision, everything else is fair game. Thus, if the United States were to ratify LOST, technology that has military as well as commercial applications could be extracted from an American company and turned over to an anti-American regime.

If America's enemies can't get our sensitive technologies through the permit process, they may instead be able to get it by taking the United States to ITLOS on some flimsy pretext, notes the Heritage WebMemo:

The convention requires states to transfer information and perhaps technology to mandatory dispute resolution tribunals. Under the convention, parties to a dispute are required to provide a resolution tribunal with "all relevant documents, facilities and information." This amounts to a blanket invitation for unscrupulous foreign competitors to bring the U.S. and American companies before a tribunal for the sole purpose of obtaining sensitive data and technologies that would otherwise be unavailable to them.

Critics have also warned that U.S. accession to LOST will open a "back door" for radical environmentalists to impose their agenda on America. LOST, says the WebMemo,

states that convention participants must "take ... all measures consistent with this Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source," (Article 194). This provision goes on to require that such measures address "all sources of pollution of the marine environment ... including those from land-based sources, from or through the atmosphere, or by dumping...." Signatories are also required to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere." (Article 212).

That essentially grants the UN control over the environmental laws of every country that signs the treaty — a fact not lost on environmental activists, some of whom have already signaled that if the United States ratifies LOST they intend to use the convention to force America to comply with the Kyoto Protocol even though the Senate has never ratified that accord.

LOST also presents a constitutional conundrum. The Constitution requires the Senate, by a two-thirds vote, to ratify a treaty for the United States to become a party to it. However, the ISA Assembly, also by a two-thirds vote, can modify the terms of the treaty at any time. This, Kirkpatrick pointed out, makes LOST "an open ended commitment," which is certainly contrary to the spirit, if not the letter, of America's supreme law.

Bogus Benefits

U.S. accession to LOST, then, will have a significant number of negative consequences. But what about the treaty's alleged benefits?

LOST backers claim the treaty will secure certain navigational rights for U.S. military and commercial shipping. However, the United States already enjoys such rights as a matter of customary international



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law. Moreover, America has for decades been a party to the International Maritime Organization, which establishes international laws with regard to shipping. Thus, to the extent LOST codifies navigational rights, it is redundant.

The treaty's fans also argue that it will secure U.S. rights to extract natural resources from its continental shelf. As with navigational rights, the United States already exercises sovereignty over its continental shelf to a distance of 200 miles from shore; and other countries, after initially contesting the U.S. claim, adopted the policy themselves. America could similarly claim rights over its continental shelf beyond 200 miles and work out its differences with the individual nations affected by such a claim. By ratifying LOST, however, it cedes such authority to the ISA and, in addition, is forced to surrender half the royalties earned from mining and drilling in the extended continental shelf.

Although LOST supporters say U.S. accession to the treaty is necessary for American companies and their investors to feel confident that their claims to deep seabed mining sites will be recognized internationally, Rabkin observed, "It remains a fair question whether a complex U.N. regulatory bureaucracy — especially one that counts international wealth redistribution as one of its functions — is a reassuring presence for investors." Knowing that the seemingly profitable site in which they are considering investing stands a good chance of being stolen by the Enterprise and that any profits generated from the site the company is allowed to mine — not to mention any new technologies employed — may be similarly confiscated, why would investors take such a risk?

As to the United States' using LOST to challenge aggressive behavior by Iran (in the Strait of Hormuz) and China (in the South China Sea), it should be noted that those countries are already parties to LOST yet have proceeded with their aggressive behavior just the same. Why anyone thinks that American participation in LOST would somehow deter them is a mystery.

All Is Not LOST

Although the Obama administration is putting on the drive to get the Senate to ratify LOST, its success is by no means certain. The House of Representatives recently voted to deny the administration millions of dollars in funding for LOST organizations, which suggests that the anti-LOST movement is strong and well-organized. Kerry has said he will not bring the treaty up for a vote before the November election because, according to *The Hill*, "some lawmakers 'on and off the committee' have candidly told him they'd 'be more comfortable' if they could avoid having to cast the controversial vote during the campaign season" — another indication that the treaty is widely unpopular.

Kerry will likely try to get LOST through the Senate during the lame-duck session after the election. That may not be easy: At least 27 Senators have signed a letter circulated by Sen. Jim DeMint (R-S.C.) stating that they will not vote to ratify LOST, and it only takes 34 Senators in opposition to sink its ratification.

If the vote is delayed until the next President is inaugurated, it could end up being opposed from the White House, which would likely prevent ratification. Obama's presumptive Republican opponent, Mitt Romney, has signaled his unease with LOST; and while the Libertarian Party's nominee, Gary Johnson, does not appear to have taken a stand on LOST, the party has in the past specifically praised U.S. refusal to join the accord.

America, by rejecting LOST, cannot stop the UN from claiming control over the oceans. But, wrote Greenley, "U.S. ratification would provide that final stamp of legitimacy for the UN's power grab over the oceans and seas and constitute a major step into world government."



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The globalist elites are pushing hard for U.S. accession to LOST. Those concerned about U.S. sovereignty and fearful of transferring more power to unaccountable international organizations will have to work just as hard to ensure that if and when the treaty finally does come up for a vote, the Senate has the guts to tell the globalists to get lost.

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