

# Issue Brief

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## Ratifying UN Law of the Sea Treaty Would Harm U.S. Sovereignty Part I

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The United States is already a party to 20 treaties<sup>1</sup> that govern all types of maritime matters related to the oceans and seas, and it would be unwise to ratify the United Nations Convention on the Law of the Sea (UNCLOS), also known as the Law of the Sea Treaty, or “LOST.” For at least six decades, the United States has been the leading nation in developing international law and practice relating to navigation and use of international waters. Most of the current legal provisions in maritime law are contained in the 20 treaties the USA is already a party to, many provisions of which have become customary international law. As attorney Steven Groves of the Heritage Foundation documented, “for more than 200 years before UNCLOS came into existence in 1982 and during the almost 30 years since then, the United States has successfully preserved and protected its maritime interests regardless of the fact that it has not acceded to the convention.”<sup>2</sup>

As long as the United States does not ratify LOST, it is free to relate to other nations directly, based on

international law, to protect and preserve its maritime rights and freedoms. But if the United States ratifies LOST, it will bring the nation under the power and direction of the International Seabed Authority (ISA or “the Authority”) and all its organizations and agencies. When the treaty was once before on a fast track to ratification, Oliver North said, “The deeply flawed, Soviet-era agreement (would give) unelected, unaccountable international bureaucrats control over 71 percent of the Earth’s surface.”<sup>3</sup>

The USA would have to contend for its rights with 162 other Party Nations such as China, Cuba, Russian Federation, Somalia, Sudan, and Yemen.<sup>4</sup> Prior to, and apart from LOST even to this day, the normal process of international relations and negotiations govern and protect the maritime rights of all nations. What LOST did was to create an international entity similar to the United Nations to supersede the sovereignty of nations and exercise governing authority over most of the Earth’s surface.

What follows are some examples of how this treaty will adversely impact American sovereignty if the United States Senate gives its consent to ratification.

## Ceding Authority & Power to “the Authority”

LOST established the *International Seabed Authority* as the global administrative institution to implement the provisions of the Treaty. All National Parties are ISA members, and the headquarters is in Kingston, Jamaica [Part XI, Art. 156]. “The Authority” has three principal organs: *the Assembly*, a *Council*, and the *Secretariat* [Art. 158], plus a commercial *Enterprise*, and the *International Tribunal for the Law of the Sea* (see Mandatory Dispute Resolution).

*The Assembly*, “the supreme organ,” has one representative from each of the 162 Party Nations, each with one vote. It has power to: “establish general policies,” elect the Council members, elect the ISA Secretary-General, and for the Enterprise, elect the Governing Board and its Director-General [Part XI, Arts. 159, 160]. It also has powers “to assess the contributions of members” (tax Party Nations for revenues), and share (redistribute) income from taxes and activities in “the Area” (all international waters). Both the Assembly and the Council have separate powers to establish any subsidiary global organizations “necessary for the exercise of (ISA) functions” [Arts. 160, 162].

**The Council** has 36 members elected from among the Assembly by that body, from its various groups of nations, for whom they speak. The Council serves as “the executive organ of the Authority”; picks the candidates for Secretary-General, Director-General and the Board; decides whether to “approve plans of work” (e.g., drilling, mining requests); initiates proceedings against countries or companies for non-compliance; may “issue emergency orders” to stop operations; can “disapprove areas for exploitation”; and creates “specific policies” based on the Treaty and the “general policies established by the Assembly” [Art. 162]. Unlike the Permanent Members of the United Nations Security Council, no member of the ISA Council has a “veto” despite the repeated statements to the contrary by proponents of LOST.

In addition, an entity called *the Enterprise* was established to “carry out the functions” of ISA worldwide, including commercial enterprises of “transporting,

processing and marketing of materials” [Part XI, Arts. 158, 170].

*The Secretariat*, or administration, is comprised of the Secretary-General (SG) and staff necessary to “fulfill the administrative functions of the Authority.” The SG is elected by the Assembly for a four-year term, serves as the ISA’s chief administrative officer, and prepares the first draft of the budget [Part XI, Arts. 166, 167, 172]. Since 2008, Mr. Nii A. Odunton of Ghana has been Secretary-General. Somewhat disconcerting is the requirement that the SG and staff function exclusively as “international officials,” who “shall not seek or receive instructions from any government or from any other source external to the Authority” [Art. 168].

The ISA classified itself as an “international legal personality” with “privileges and immunities” that cover its leaders, representatives of Member Nations, personnel, property, assets, documents, archives, industrial secrets, and proprietary data, plus exemption “from all direct taxation” on personnel or goods exported or imported [Part XI, Arts. 176-183].

**If the USA does not ratify LOST**, it retains all of its sovereign rights over its territorial waters, continental shelf, and the airspace above, plus all the rights in and above international waters recognized in international law.

**If the USA ratifies LOST**, all of the rights mentioned above are restricted and regulated by the ISA and its Member Nations, and the USA would become just one voice with one vote among 163 nations, with no veto power, and far less influence than it enjoys in other international bodies, such as the United Nations Security Council. Any American plans for exploration or exploitation of resources within international waters would require Council approval, which could also stop operations at anytime. The U.S. Government and American companies would be required to provide proprietary information to the ISA for any activities or

operations in the Area, but would have no control over that information, and be prohibited from prosecuting any ISA personnel for misuse of that information. In fact, the ISA is authorized to transfer “technology and scientific knowledge” to developing nations [Part XI, Arts. 144, 150 (d)]. The U.S. Government and American companies would likely have little influence on the Secretariat, whose leaders and staff would be prohibited from receiving any special influence or “instructions” from them. Also, the USA would be required to grant ISA leaders and representatives the same “privileges and immunities” that high officials and diplomats from foreign nations enjoy. In addition, while the ISA would collect revenues (taxes) from the USA and royalties (taxes) from American companies with operations in international waters, ISA leaders, staff, and goods cannot be taxed.

## **LOST Claims Global Jurisdiction & Denies National Rights**

**LOST claims authority and ownership of 71 percent of the surface of the Earth.** Instead of recognizing the obvious truth and historical fact that no person, nation, or government owns the open seas and skies reasonably beyond national borders, LOST vaguely claims, “The Area and its resources are the common heritage of mankind” [Part XI, Art. 136]. The Treaty defines the Area as “the seabed and ocean floor,” subsoil, and skies, “beyond the limits of national jurisdiction” [Preamble; Part I, Art. 1(1)]. By the “common heritage” claim, the Treaty seeks to bring nearly three-fourths of the Earth’s surface under ISA and developing nations control. As Doug Bandow wrote in a report for the Competitive Enterprise Institute, “Among the precedents enshrined by the LOST is that the nation states—not peoples—of the world collectively own ‘all the unclaimed wealth of this Earth.’”<sup>5</sup>

Thus, LOST declares, **“No State may validly purport to subject any part of the high seas to its**

**sovereignty,”** or exercise “sovereign rights over any part of the Area or its resources.” [Part VII, Art. 89; Part XI, Art. 137]. Party Nations as a whole claim global jurisdiction over the high seas, and all its resources, and agree together that they have no right to any individual claim that they themselves don’t approve.

**If the USA ratifies LOST,** then “ownership” of “the Area” goes to the United Nations and ISA, both global government entities. Subsequently, whatever the U.S. Navy, Air Force, Army, Marines, Coast Guard, Government, or American Companies did or desired to do on, under, or above international waters could be subject to ISA oversight and approval. The U.S. Government and American companies would lose the right to make any sovereign or independent claim on the resources in international waters, and U.S. authority within its own continental shelf would be diminished. Mr. Bandow observed, “Granting ownership and control to Third World autocracies with no relationship to the resource nor any ability to contribute anything to their development makes neither moral nor practical sense.”<sup>6</sup>

## **ISA Oversight of Compliance & Operations**

**LOST set up an “international regime” to regulate National Party compliance with the Treaty.** The ISA is authorized to take “any measures” it deems necessary at any time to secure compliance with Treaty provisions, including inspections of “all installations in the Area” [Preamble; Part I, Art. 1 (2); Part XI, Arts. 153 (4, 5), 154].

**If the USA ratifies LOST,** the ISA – and thus other nations through the Council, Assembly and Secretariat – would exercise oversight of the United States and American companies in international waters, and be authorized to take “any measures” necessary to force them into compliance with what they view as Treaty obligations. Further, the ISA could inspect drilling platforms in “the Area” at will.

## **ISA Oversight of National Waters & Airspace**

**LOST proclaims that a nation's sovereignty over its own seas and skies is limited.** The Treaty affirms national "sovereignty over the territorial sea" and "the air space" above, but says it is "exercised subject to this Convention and to other rules of international law" [Part II, Art. 2].

**LOST defines and limits continental shelf rights.** The Treaty declares that a coastal nation's continental shelf extends to "200 nautical miles" from its coastline [Part VI, Art. 76], within which it may establish an "exclusive economic zone" (EEZ) [Part V, Arts. 55-57]. In addition, depending on depth of the water (e.g., "submarine ridges"), a nation can claim certain rights over the extended continental shelf, up to "350 nautical miles from the baselines" (i.e., coastline), or an additional 150 nm [Part VI, Art. 76 (5-6)]. Yet the treaty guarantees other nations some "rights" within the EEZ [Part V, Art. 58]. For example, developing or land-locked or "geographically disadvantaged" nations in the same region are given "the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources," to include fishing rights [Part V, Art. 69-70]. Also, any nation is "entitled to lay submarine cables and pipelines on the continental shelf," though the conditions and location must be approved by the coastal nation [Part VI, Art. 79]. There are some limits to these so-called "rights" of foreign nations; they do not extend to drilling or to "mineral and other non-living resources" within another nation's continental shelf [Part VI, Arts. 77, 81].

**LOST controls sea-lanes.** Nations have the prior authority to establish sea-lanes for safe passage of ships, but the Treaty requires Party Nations to submit plans, proposals or changes to the International Maritime Organization for approval [Part III, Art. 41 (4)].

**If the USA ratifies LOST,** all U.S. and state laws and policies pertaining to our territorial waters, continental shelf, sea-lanes, and airspace above, would be subject to ISA oversight and approval. For example, the USA could not change its territorial water boundaries or sea-lanes without approval. The USA could be forced to respect foreign "rights" (e.g., fishing) within our continental shelf, or EEZ. Regarding the extended continental shelf,

Steven Groves, a legal specialist in national sovereignty issues, wrote an excellent brief revealing how the "U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf."<sup>7</sup>

## ISA Control of Rights of Passage

**LOST defines rights of passage.** The Treaty says, "The high seas are open to all States" for "freedom of navigation," "freedom of overflight," etc. [Part VII, Art. 87]. Article 38 proclaims: "all ships and aircraft enjoy the right of transit passage, which shall not be impeded" in international waters and airspace. That includes enemy and terrorist ships and planes. Similar provisions in prior international treaties that protected these rights to all nations simply recognized their inherent nature. But LOST created a global enforcement agency, and posits the ISA as "the Authority" to define, and thus limit, those rights [Part III, Arts. 34-44].

**If the USA ratifies LOST,** it denies that the freedoms of navigation and overflight of the high seas are inalienable, and affirms ISA's authority to define and limit those freedoms. Also, U.S. national security would be compromised because U.S. Navy vessels could not interdict, on the high seas, ships under the control of terrorists or enemy governments, including ships carrying weapons of mass destruction.

## Criminal & Civil Prosecution Hampered

**LOST prohibits the government of a coastal nation from arresting – exercising "criminal jurisdiction" over – a person on board a foreign ship** for "any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters" [Part II, Art. 27]. Also, if the person has a civil liability, the coastal nation is prohibited from taking any action against the person or ship [Art. 28].



**If the USA ratifies LOST**, its government, Coast Guard, military or police forces would be prohibited from arresting and prosecuting a person who committed a crime or had a civil liability, including under federal or state law, as long as the individual stayed on the ship and the ship did not enter internal USA waters.

## **Mandatory Dispute Resolution**

**Dispute settlement is mandatory and binding**, including disputes between Party Nations or a Party Nation and the ISA. These are settled either by the Seabed Disputes Chamber, or if referred, by the International Tribunal for the Law of the Sea. A Party Nation that disputes a commercial contract may request that it be settled through “binding commercial arbitration” [Part XI, Arts. 186-188].

**If the USA ratifies LOST**, then anytime another Party Nation wants to file a claim or dispute against the USA or an American company, the USA must submit itself to the dispute resolution process. If it involves

an American company, that company can be forced to participate in arbitration, with the result being binding. Expect lots of disputes and claims.

## **Conclusion to Part I**

The United States, American ships, and American international companies, enjoy all of the inherent freedoms and rights to the oceans and seas, and their resources, already recognized or protected in international treaties to which the USA is a party. Currently the USA relates directly with national governments and through the International Maritime Organization to protect its navigational rights. This partial review of the U.N. Convention on the Law of the Sea reveals many ways the U.S. Government would sacrifice inherent liberties and national sovereignty if it ratifies LOST.

Part II covers additional reason why the U.S. should not ratify this treaty.

1. United States maritime treaties ratified as of early 2010 include: Convention on the High Seas (negotiated 1958, entry into force or for USA 1962); Convention on the Continental Shelf (1958, 1964); Convention on the Territorial Sea and the Contiguous Zone (1958, 1964); International Convention for the Safety of Life at Sea (1960, 1965; 1974, 1980; 1978, 1981; 1988, 2000); Convention on International Council for the Exploration of the Sea (1964, 1973); Convention on International Maritime Traffic (1965, 1967); Convention on the International Regulations for Preventing Collisions at Sea (1972, 1977); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978, 1991); International Convention on Maritime Search and Rescue (1979, 1985); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988, 1995), with Protocol to protect Fixed Platforms Located on the Continental Shelf (1988, 1995); as well as others pertaining to salvage at sea (1910, 1913; 1889, 1996), carriage of goods (1924, 1937), waterborne transportation (1963, 1981), load lines (1966, 1968; 1988, 2000), and tonnage measurement of ships (1969, 1983). List in: "Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010"; see Maritime Matters, pp. 400-411. <http://www.state.gov/documents/organization/143863.pdf>
2. "Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms," by Steven Groves, Heritage Foundation, Backgrounder No. 2599, August 24, 2011. This 38-page brief meticulously documents how the USA and its military have protected American navigational rights without becoming a party UNCLOS.
3. "Law of the Sea Treaty on Fast Track to Ratification," by Oliver North, FoxNews.com, October 11, 2007.
4. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, Status as at 29-08-2011 (current list of signatory and party nations). <http://treaties.un.org>
5. "The Law of the Sea Treaty: Impeding American Entrepreneurship and Investment," by Doug Bandow, Competitive Enterprise Institute, publication 2007 No. 1, September 2007, pg. 12.
6. Ibid.
7. Heritage Foundation Backgrounder No. 2561, June 8, 2011. <http://report.heritage.org/bg2561>