

Issue Brief

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

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The United States of America should not ratify the United Nations Convention on the Law of the Sea (UNCLOS), known as the Law of the Sea Treaty (LOST).¹ Part I of this series mentioned the 20 treaties the USA is already a party to, which govern maritime matters in territorial and international waters globally. Part I also revealed numerous ways the USA would sacrifice its national sovereignty, compromise national security, harm American companies, hamper criminal prosecution, and subject our nation to a mandatory dispute resolution process. This Part II continues the list of consequences if the United States Senate approves LOST for ratification.

USA Would be Biggest Donor & Fund Global Wealth Redistribution Scheme

Multiple sources of revenue. LOST contains six mechanisms, or sources of revenue, to fund the International Seabed Authority (ISA or “the Authority),

and its principal organs – the Assembly, Council, Secretariat, Enterprise, and International Tribunal for the Law of the Sea (see Part I).

- (1) Assessed contributions that are required payments from Party Nations;
- (2) 1 to 7 percent graduating tax and other revenues collected by the Authority (i.e., from drilling or mining operations more than 200 nautical miles [nm] offshore);
- (3) funds from the Enterprise and its operations;
- (4) borrowed money;
- (5) voluntary contributions; and
- (6) “payments to a compensation fund,” made by companies or Party Nations, to compensate developing nations for exploitation of resources in their region [Part VI, Art. 82; Part XI, Art. 171].

Assessed contributions. The current primary source of revenue for the ISA is “assessed contributions” from Party Nations. The ISA utilizes the United Nations Regular Budget scale of assessment. The vast majority of the 162 ISA Party Nations pay less than 1 percent in Regular Budget dues to the UN, and thus also to the ISA. Because the United States is the largest contributor to the UN, paying 22 percent, if the USA ratified LOST,

it would also pay 22 percent of the ISA budget.

First international tax scheme on production. LOST established a 1-7 percent tax on Party Nations for “the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles.” This tax is targeted at oil and natural gas drilling, and mining operations, on the so-called “extended continental shelf” (200-350 miles offshore). For example, after “the first five years of production,” for the 6th year, the production of oil rigs outside the “exclusive economic zone” (EEZ), or continental shelf of a coastal nation, would be subject to a “1 per cent (tax) of the value or volume of production at the site.” This annual tax would “increase by 1 per cent for each subsequent year until the twelfth year,” and then remain at “7 per cent thereafter” [Part VI, Art. 82].

Companies from LOST Party Nations make the ISA tax payments to their government, who then makes an annual payment to the ISA, who then redistributes the revenue to other Party Nations of its choice, especially developing, least-developed, or landlocked nations [Part VI, Art. 82; Part XI, Art. 140]. There is one exception: any developing nation that imports oil drawn from its own continental shelf would be exempt from the tax [Art. 82 (3)].

Global wealth redistribution scheme. Utilizing the tax revenues just described, plus other sources of revenue listed above, LOST set up a system for redistribution of wealth from developed to developing nations. It does so under the disguise of “principles of justice and equal rights” that supposedly “will promote the economic and social advancement of all peoples of the world.” Their goal is to achieve “a just and equitable international economic order,” especially for “the special interests and needs of developing countries, whether coastal or land-locked” (Preamble).

If the USA does not ratify LOST, American citizens will not be forced to pay millions of tax dollars in national “assessed contributions”; American oil and mining companies won’t have to pay an additional 1-7 percent tax on production; and American citizens will be spared consequent increases in the costs of gasoline, natural gas, and other resources.

If the USA ratifies LOST, the Federal Government, at the expense of American citizens, would be required to fund 22 percent of the ISA budget. The U.S. Government would also be required to collect ISA taxes from American companies with drilling or mining operations in international waters. Fuel costs would go up for all Americans.

Oil and natural gas companies drilling within the USA continental shelf must first acquire a license from the Government, and then pay royalties ranging from 12.5 to 18.75 percent of production into the U.S. Treasury for the benefit of the American people. According to Steven Groves of The Heritage Foundation, the U.S. Government would have two options for paying ISA “international royalties”: (1) deduct the 1-7 percent (or higher) international ISA tax from the 12.5 to 18.75 percent royalties, which would result in the loss of billions of revenue dollars each year; or (2) penalize those companies with an additional tax to cover the international royalties, and then transfer that amount to the ISA.²

In addition, if the USA ratifies LOST, the U.S. Government will initiate possibly the greatest wealth transfer in history, providing, without oversight or accountability, millions or billions of dollars to numerous developing nations. Those funds could be given to enemy nations and those who harbor terrorists. Thus, the USA could find itself funding military or terrorist operations against our own country.

The recent history of massive government international assistance to developing countries, nearly all for ostensibly good purposes, reveals the corrupting nature of such aid. I’ve been in recipient nations whose government and corporate leaders grow wealthy while there is little evidence of vast international aid investments within the country. The United Nations itself has a pathetic record of stewardship of funds entrusted to it, including the current billion dollar cost increase in the renovation of its headquarters in New

York.

One of the consequences of the fall of mankind is his propensity to devalue or squander what he did not build or earn. Mankind was created in such a way that he values that which he makes an investment in, both relationally and materially. When the USA and other nations give large sums of money to government leaders, international monetary entities, or corporations, they should expect a significant portion of those funds to be misappropriated.

ISA Control of Fishing, Drilling, Mining, Exploration & Research

LOST claims control over all resources in the Area for the alleged “benefit of mankind as a whole.” LOST declares that, “All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act” [Part XI, Art. 137]. Also, “Activities in the Area shall be organized, carried out and controlled by the Authority,” and “be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,” as well as “foster healthy development of the world economy” [Arts. 140, 150, 153]. Thus, non-living (e.g. oil, minerals) resources extracted from the Area are subject to income distribution through taxation (described above).

LOST denies the inherent right of exploration in international waters. The inherent right to explore the ocean and its seabed outside of national waters is denied to Party Nations. LOST claims jurisdiction over “All activities of exploration” in international waters, and requires all exploration to “be carried out for the benefit of mankind as a whole” under the control of the ISA [Preamble; Part I, Art. 1 (3); Part XI, Art. 153].

LOST restricts “marine scientific research in the Area” by declaring that it may only be done “for the benefit of mankind as a whole,” not for the benefit of any

individual, company, or nation. Yet the ISA asserts its right to “carry out marine scientific research concerning the Area and its resources” [Part XI, Art. 143]. So look for unrestricted ISA ships.

LOST subjects fishing rights within a nation’s “exclusive economic zone” to the oversight of “competent international organizations, whether subregional, regional or global” [Part V, Art. 61]. Also, if nationals (commercial fishermen) do “not have the capacity to harvest the entire allowable catch,” the nation must give foreigners “access to the surplus of the allowable catch” [Art. 62]. Regarding fishing in international waters, the treaty requires Party Nations to (a) create a multi-national management system to monitor and conserve the “living resources” (fish and marine mammals) therein, (b) determine “the allowable catch,” and (c) share “catch and fishing effort statistics” with international organizations [Part VII, Arts. 116-120].

ISA claims ownership of drilling and mining rights. LOST says that no nation, company, or individual can “claim, acquire or exercise rights” over “the minerals recovered from the Area except in accordance” with the Treaty, and thus only with ISA approval, and subject to the international royalties tax scheme [Part XI, Art. 137]. If an oil or mining company from a Party Nation wants to build a platform in international waters, they must first get their plan approved by the 36-member Council, and then receive a “production authorization” before beginning any work [Arts. 147, 151]. If the Council and ISA grant a commercial license, every 15 years the Assembly is to convene a “Review Conference” to assess compliance with Treaty provisions, including determining if the work has benefited all countries by “sharing the benefits” of the resource exploitation [Art. 155].

If the USA does not ratify LOST, Americans will continue to enjoy unhindered use of our continental shelf and the high seas for exploration, research, fishing, drilling, and mining. National Oceanic and Atmospheric Administration (NOAA) ships can keep traversing and conducting research on international waters. American fishermen can continue fishing in territorial, continental shelf, and the high seas without international restrictions or oversight, or having to

reveal where they catch fish. American oil and mining companies will be free to drill and extract resources, subject only to USA royalty taxes. American mining companies may exploit resources of the deep seabed through the Deep Seabed Hard Mineral Resources Act.

If the USA ratifies LOST, it denies the inherent right of access and use of international waters, and their resources, recognized throughout history. No American could claim, acquire, or extract any mineral or other non-living resource from international waters without ISA approval. Any American company seeking to drill for oil or natural gas, or mine for minerals in the Area would have to gain ISA approval first, and then be required to pay international taxes on extracted resources. If they received approval, their operation would be subject to ISA review every 15 years. If the company failed to pay the international royalty tax, the Assembly would most likely revoke its license, and the enormous start-up and operational investment costs would be lost.

The ISA in conjunction with a multi-national management system and “competent international organizations” (e.g., GreenPeace), would assume oversight of commercial fishing. These entities could harm or hamstring commercial fisherman by allowing foreigners to fish in USA waters risking depletion of fish resources, by setting arbitrary limits on “the allowable catch,” and by requiring American fishermen to reveal where they are catching fish.

The U.S. Government, NOAA, and American companies would lose their unfettered freedom to explore and conduct research on the high seas because these activities would require ISA approval. Any benefits of that exploration or research would have to be shared with the whole world.

ISA Control of Prices & Markets

The ISA has some measure of global control over prices for the sale and purchase of “minerals derived both from the Area and from other sources” [Part XI, Art. 150 (f)].

The ISA claims authority over production and markets to promote “growth, efficiency and stability” by working through existing mechanisms, or creating new mechanisms. The ISA also claims an arbitrary “right to participate in any commodity conference dealing with those commodities,” as long as “both producers and consumers participate”; and “to become a party to any arrangement or agreement resulting from such conferences” [Part XI, Art. 151]. Thus, for Party Nations, international meetings of governments and corporations that meet ISA criteria are no longer closed; and the Treaty requires that the ISA (and thus all LOST Party Nations) become a party to any pertinent agreements between the participants.

If the USA does not ratify LOST, then the ISA cannot exercise any direct control over the production, prices, or markets for resources extracted by American companies. They will remain free to sell oil, natural gas, or minerals at the prices they choose or the market will bear. Private meetings and exclusive agreements would remain so.

If the USA ratifies LOST, the ISA, with the wealthiest nation as a member and substantially increased financial resources, will greatly increase its efforts to control global markets. The U.S. Government and American companies could no longer control who is invited to international commodity meetings, nor could they limit with whom they will enter into international agreements on these matters.

Technology Transfers

LOST mandates the ISA “to acquire technology and scientific knowledge” and transfer it to developing nations [Part XI, Arts. 144, 150 (d)]. In other words, Party Nations can force oil and mining companies owned by their nationals to give their technology and scientific knowledge to the ISA, and to those who claim they cannot afford to pay for the information, services, or products. Doug Bandow, in “The Law of the Sea Treaty:

Impeding American Entrepreneurship and Investment,” accurately dubs this “coerced collaboration.”³

The 1994 amendments do contain some language to protect “intellectual property rights,” but at the same time require Party Nations to “cooperate fully and effectively with the Authority” to ensure that “The Enterprise, and developing States” can “obtain deep seabed mining technology.”⁴ Yet, as Bandow points out, “the Enterprise and developing nations would find themselves unable to purchase machinery only if they were unwilling to pay the market price or preserve trade secrets, or a government restricted the sale of technology with sensitive dual-use (military or security) capabilities.”⁵

If the USA does not ratify LOST, then the U.S. Government and American companies would not be required to transfer or reveal any related technology secrets or scientific knowledge. Without this mandate, companies can voluntarily, out of goodwill, share expertise and information, while safeguarding vital corporate, technology, patented, or other secrets.

If the USA ratifies LOST, American companies will be forced to give to the ISA and foreign nations their “technology and scientific knowledge.” If the U.S. Government forces companies to give proprietary information, this would be a form of government-sanctioned theft, disregarding property rights, copyrights, patents, and large investments of the owners.

Navigation & Security Hampered

LOST grants foreign ships safe passage through the territorial waters of other nations. It rightly declares that, “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea” [Part II, Art. 17]. But the Treaty says this includes, “Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances” [Art. 23]. Foreign war ships and

government ships are permitted passage as long as they “comply with the laws and regulations of the coastal” nation [Art. 30]. Also, foreign “submarines and other underwater vehicles” are permitted in the territorial sea if they “navigate on the surface and show their flag” [Art. 20].

The “meaning of passage” portends to prohibit “traversing ... internal waters,” but then permits “proceeding to or from internal waters” [Part II, Art. 18]. Article 19 defines “innocent passage” but leaves it up to foreign vessels to ensure they are not in violation of any of the 12 non-authorized activities listed as “prejudicial to the peace, good order or security of the coastal” nation (e.g., “threat or use of force,” “collecting information,” “fishing activities”). Article 21 limits laws and regulations a nation can make about “innocent passage.”

LOST grants warships and government ships “immunity from the jurisdiction of any” foreign nation [Part VII, Arts. 95-96]. Because of the United Nations incapacity to define “terrorism,” this provision would protect terrorists, at least those who are acting under the authority of a national government.

“Hot pursuit” limited. Regarding “hot pursuit” of a suspicious vessel, David Ridenour of The National Center for Public Policy Research wrote, “The treaty does permit [nations] to pursue, apprehend and board ships for violation of other laws and regulations,” but only if the pursuit began within the “internal waters” or “territorial sea or the contiguous zone of the pursuing State.” Further, the pursuit may “only be continued outside” that zone “if the pursuit has not been interrupted” [Part VII, Art. 111].⁶

If the USA does not ratify LOST, the U.S. Navy can continue to exercise innocent passage rights through the territorial and continental shelf waters of other nations, including with submerged submarines; and can use international sea-lane passages between nations. These activities are essential to upholding international navigation rights that are critical for both military and commercial purposes. The USA retains its full authority to control our internal and territorial waters, and to prevent unwelcome foreign warships

or submarines from entering. Also, the U.S. Navy can continue to stop a ship under the control of terrorists, or suspected of carrying weapons of mass destruction.

If the USA ratifies LOST, then our Government would lose full direct control over foreign navigation rights within our own territorial waters and continental shelf. The USA would be required to allow Chinese, Russian and other foreign warships, government ships, or submarines passage through our territorial waters so long as there was no evidence of “threat or use of force” or other prohibited activities. This may require a massive buildup of the Coast Guard. Further, the U.S. Navy would be prohibited from stopping warships or government vessels in international waters, would have to grant all foreign warships total immunity, and could not exercise any legal jurisdiction over their personnel.

Environment & Pollution Oversight

LOST claims jurisdiction over “pollution of the marine environment”, including “dumping” requiring Party Nations to:

- (a) conform their laws to the Treaty,
- (b) take actions to ensure compliance within their territorial seas,
- (c) ensure compliance of any ships flying their flag anywhere worldwide, and
- (d) form an international oversight entity comprised of multiple nations and international organizations (e.g., environmental and mining watch groups) to oversee fishing, drilling, and mining operations [Part XII, Arts. 1, 207-237, especially 210, 216].

International and non-governmental organizations (NGOs) could have extraordinary influence upon the ISA and Party Nations. The ISA Secretary-General is required to “make suitable arrangements ... for consultation and cooperation” with them, and is authorized to distribute their reports to Party Nations. This appears to be restricted to “organizations recognized by the Economic and Social Council of the United Nations” [Part XI, Art. 169]. The Heritage Foundation brought to light Greenpeace International’s “plans to leverage the treaty to advance its agenda,” an agenda that “often runs counter to U.S.

interests.”⁷

If the USA does not ratify LOST, then the U.S. Government retains its sovereign right to regulate the environment, pollution, and dumping within its territorial waters and continental shelf. USA Federal and State Governments, and American companies, would not be put in subjection to other nations or international NGOs regarding these policies or practices.

If the USA ratifies LOST, then the U.S. and some State Governments, American ships, and the commercial activities of American fisherman, oil and mining companies, will be subject to the oversight of the ISA, its Secretariat, international NGOs, and a multi-national-NGO oversight committee. This oversight would include monitoring of pollution and dumping.

Conclusion of Part II

Ed Feulner, President of The Heritage Foundation, warned that, if the United States ratifies LOST, unlike the “toothless condemnations” from the United Nations, “this authority would have the actual power to thwart American interests.” That is precisely what both of these briefs, Parts I and II, have demonstrated in many and various ways. It is difficult, if not impossible, to discern any benefit of ratifying LOST that is not exceedingly outweighed by detrimental effects. Let us pray and hope that the United States Senate retains wise discernment.

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1. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm
2. "U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf," by Steven Groves, Heritage Foundation, Backgrounder No. 2561, June 8, 2011. <http://report.heritage.org/bg2561>
3. "The Law of the Sea Treaty: Impeding American Entrepreneurship and Investment," by Doug Bandow, Competitive Enterprise Institute, 2007 No. 1, pg. 10.
4. Op. cit., "Agreement Relating to the Implementation," Annex, Section 5. Transfer of Technology, par. 1 (a-c).
5. Op. cit., "The Law of the Sea Treaty," by Doug Bandow.
6. "Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage," by David A. Ridenour, Vice President, The National Center for Public Policy Research, No. 542, August 2006. www.nationalcenter.org
7. "The Top Five Reasons Why Conservatives Should Oppose the U.N. Convention on the Law of the Sea," by Baker Spring, Steven Groves, and Brett D. Schaefer, The Heritage Foundation, WebMemo No. 1638, September 25, 2007.
8. "They Just Don't Get LOST," by Ed Feulner, President, The Heritage Foundation, *The Washington Times*, October 25, 2007.