

SUBMITTED TESTIMONY OF

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‘RONALD REAGAN WAS RIGHT: THE LAW OF THE SEA TREATY WAS *AND REMAINS* UNACCEPTABLE’

Mr. Chairman, I appreciate your invitation to contribute to your deliberations on the United Nations Convention on the Law of the Sea, better known as the Law of the Sea Treaty (LOST). I had the privilege of working for President Reagan’s administration and it is my considered judgment that Mr. Reagan was correct in his judgment that LOST was not consistent with U.S. national security, sovereignty and economic interests. I believe that remains the case today and strongly encourage the Senate to decline to consent to the ratification of this defective accord.

The Senate’s Duty

Before turning to the substance of the Treaty, I feel constrained to make an observation about the process.

At an early and formative moment in my career, I had the privilege of working on the staff of what has been known as the “World’s Greatest Deliberative Body,” the United States Senate. Under the tutelage of two of its most formidable members, Democrat Henry M. “Scoop” Jackson and Republican John Tower, I saw firsthand the exercise of one of the Senate’s most important duties under the Constitution: Its responsibility to advise and consent to treaties by a two-thirds majority.

I believe the Framers wisely entrusted this role to the upper body – and set the bar for treaty approval so high – precisely because they understood that treaties would become “the supreme law of the land,” with potentially far reaching implications for the nation and its Constitution. In my opinion, that has never been more true than with respect to the Law of the Sea Treaty.

It is, therefore, frankly appalling to me that the present approach to Senate consideration of this accord amounts to little more than a rubber-stamp. To be sure, I am delighted to be allowed to critique this Treaty – an opportunity that this Committee previously denied those of us who oppose LOST.

The Senate leadership's seeming intention, however, to restrict such criticism to two experts each of whom is being given five minutes publicly to inform the Senate about a vast array of concerns concerning one of the most far-reaching international agreements in history virtually amounts to the same thing: **a determined effort to keep the American people in the dark about what is going to happen to their rights, their constitutional, representative form of government and our national interests until after LOST is ratified and is too late to do anything about it.**

In my capacity as a participant in the Coalition to Preserve American Sovereignty, I have written the chairmen and ranking members of eight committees of the U.S. Senate. Important aspects of each of those committees' jurisdiction will be affected, in some cases profoundly, by the Law of the Sea Treaty. I would ask that these letters be made a part of the permanent record of this proceeding.

As one who feels privileged to have served on the staff of this body and cherishes its constitutional role as a "quality control" mechanism on treaties, I feel obliged to be blunt: **It would be incomprehensible and irresponsible were each of these eight panels to fail to conduct their own hearings into LOST's implications.**

This Committee can *and should* exercise real leadership by encouraging such further oversight by your colleagues. You would, thereby, maximize the chances that informed and sound decisions are made – rather than ill-considered, hasty and possibly lethal ones that will prove, as a practical matter, to be irreversible.

Such a comprehensive review would, moreover, demonstrate the confidence that supporters of the Law of the Sea Treaty have in this accord. The alternative approach, allowing for only the most superficial examination of the Treaty, by contrast simply reinforces our belief that LOST cannot withstand close scrutiny.

The Case Against the Law of the Sea Treaty

Let me turn now to a review of the arguments against U.S. accession to the UN Convention on the Law of the Sea. With the understanding that my colleague, Fred Smith of the Competitive Enterprise Institute, is going to cover the Treaty's many problematic repercussions for the American economy and businesses should this country become a state party, I am going to confine myself to the following aspects: LOST's negative impact on U.S. sovereignty and national security interests.

LOST is a vast and complex undertaking, with obligations and implications that go far beyond the codification of common navigation rights and arrangements that were the initial impetus for the Treaty.

We cannot safely ignore the fact that, during its negotiation, **LOST became a vehicle for advancing an agenda promoted by the Soviet Union and so-called "non-aligned movement" during the 1970s, known as the New International Economic Order (NIEO).** The NIEO was a classic "united front" effort aimed at undermining the

economic and military power of the industrialized West – particularly the United States – in the name of a centrally planned, global redistribution of wealth to the benefit of developing nations.

Toward this end, **LOST creates various supranational bodies to develop and enforce its provisions, complete with an executive branch, legislature and judiciary.** These agencies operate on the basis of one-nation/one-vote – an arrangement that has proven in the United Nations and elsewhere to be highly disadvantageous to the United States.

The Reagan Objections

The foregoing considerations were among the reasons that prompted Ronald Reagan to reject the Law of the Sea Treaty. Even prior to his election to the White House in 1980, Mr. Reagan had made known his opposition to LOST, which was then still under negotiation. Then, as President in 1982, he formally rejected the draft treaty and identified a large number of changes required to make it acceptable to his administration. Those changes were not adopted in subsequent negotiations and Mr. Reagan refused to sign what he considered to be a defective accord.

Among the specific concerns with LOST identified by President Reagan in 1982 were:

- **the lack of adequate American influence within the decision-making bodies of the International Seabed Authority (ISA), in charge of regulating deep seabed mining in the oceans;**
- **limitations on exploitation of the deep seabed;**
- **mandatory technology transfers to the ISA and developing countries;**
- **the competitive advantage given to a supranational mining company affiliated with the ISA known as the “Enterprise”;**
- **the imposition of financial burdens on deep seabed mining operations; and**
- **the potential for the ISA to impose regulatory burdens on the American mining industry.**

In other words, President Reagan was concerned not simply with specific provisions of Part XI of the Law of the Sea Treaty that dealt with deep seabed mining. As his chief negotiator for LOST, the late **Ambassador James Malone**, noted in a *Foreign Policy* article in 1984:

...Security and economic interests vital to national well-being and the principles that form the foundation of American democracy must be given

priority by those individuals entrusted to make public-policy decisions. **It was this basic responsibility that made it necessary for the president to decide against U.S. acceptance of the United Nations Convention on the Law of the Sea in 1982.**

Many of President Reagan's chief lieutenants – including: his National Security Advisor, **Judge William Clark**; his Counselor and Attorney General, **Edwin Meese**; his Secretary of Defense, the late **Caspar Weinberger**; his UN Ambassador, the late **Jeane Kirkpatrick**; and his Secretary of the Navy, **John Lehman** – agree that what Mr. Reagan found objectionable about LOST could not be fixed by relatively minor reworking of its provisions related to the International Seabed Authority.

The 1994 Agreement Did *Not* Amend LOST

There are those who nonetheless assert that the Agreement negotiated in 1994 by the Clinton Administration addressed and corrected the problems President Reagan had with the Law of the Sea Treaty. This is inaccurate on its face given that, by LOST's own terms, the Treaty could not be amended for a decade after it entered into force. Since the Treaty did not enter into force until 1994, it was not available for amendment until 2004 – ten years *after* the 1994 Agreement was signed.

Even if LOST had been available for amendment, moreover, the 1994 Agreement did not conform to the procedures specified by the Treaty for adopting amendments. As a result, the terms of the Treaty have not been formally altered.

Presumably, it is for these reasons that **the 1994 Agreement does not explicitly amend LOST**. Rather, the Agreement states that “The provisions of this Agreement and Part XI [of LOST] shall be interpreted and applied together as a single instrument.”

At the time the Agreement was signed, a representative of the American ocean mining industry cited this shortcoming in testimony before Congress: “[The 1994 Agreement] does not even purport to amend the Convention. It establishes controlling ‘interpretive provisions’ that will control in the event of a dispute. *This is not an approach that gives confidence to prospective investors in ocean mining.*” (Emphasis added.)

Neither does the 1994 Agreement require any of the LOST tribunals to abide by the Agreement. This increases the likelihood that such panels, when hearing disputes between parties, will view LOST itself as the basis for resolving the dispute, and not the 1994 Agreement.

That is especially so since **roughly sixteen percent of the parties to LOST – fully 25 member countries – have yet to sign the 1994 Agreement**. It is far from clear on what basis these countries could be expected to view the Agreement's purported revisions to the Treaty as legitimate. How, for instance, would resolutions be achieved in disputes between countries that are party to both LOST and the Agreement, on the one hand, and countries that are party only to LOST, on the other? At the very least, the latter

could legitimately challenge claims by the United States (or others) to be bound by terms other than those contained in the Law of the Sea Treaty's agreed text.

The 1994 Agreement's Shortcomings

The foregoing issues aside, the Agreement falls significantly short of meeting Mr. Reagan's concerns – even with respect to the problematic sections of LOST that it *does* address. For example:

- **The lack of U.S. Influence:** The 1994 Agreement requires that any ISA Assembly decisions concerning administrative, budgetary and financial matters must be based on recommendations by the ISA Council. While the Agreement effectively guarantees the United States a seat on the Council, it does not assure this country a veto. To the extent the Council operates on the basis of consensus, America may have what amounts to such leverage. But nothing prevents the Council from acting instead on the basis of majority rule – in which case, Mr. Reagan's concerns would still apply.

For example, **the 1994 Agreement still allows the ISA to amend LOST without American consent.** The UN Secretary General can convene a conference, at which the Assembly and Council can vote to accept an amendment to LOST. It then requires the approval of three-fourths of LOST's states parties to become final. As is often the case in UN settings, the United States could simply be outvoted.

Furthermore, the argument that the United States would have to ratify any “amended treaty” to be bound by its terms ignores the reality of how LOST would likely work in practice. Changes that affect the U.S. could manifest themselves in the form of *regulations* decided upon within LOST bodies, which would not be ratified externally. Additionally, whether or not LOST is being “amended” in the formal sense would be dependant upon the subjective views of the LOST deliberative bodies. The U.S. could therefore find itself bound by modifications to LOST even without U.S. ratification of such changes.

- **Mandatory Technology Transfers:** Although the 1994 Agreement purports to modify some troubling LOST provisions on the obligatory sharing of sensitive information and technologies, it fails to address, *let alone alter*, other coercive provisions. These include LOST's requirement that states parties “promote the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data.”

Neither does the Agreement speak to LOST's requirement to transfer information and perhaps technology pursuant to the Treaty's mandatory dispute resolution mechanisms. Parties to a dispute are required to provide the tribunal with “all relevant documents, facilities and information.” This amounts to an invitation for competitors to bring the United States and/or its companies or adversaries before a LOST tribunal

to obtain sensitive data and know-how. These are hardly the sorts of safeguards upon which President Reagan had insisted.

- **LOST's Implications for U.S. Businesses:** Another topic unaddressed by the Agreement is LOST's requirement that half of each area surveyed by an American mining company must be turned over to the ISA for exploration by the Enterprise – *with the ISA choosing which half*. President Reagan correctly viewed this arrangement as one that would force American companies to assist their competitors.
- **LOST's Financial Burdens:** Although the 1994 Agreement purports to lessen some of the onerous costs associated with exploiting the deep seabeds' natural resources, other burdens imposed by LOST go unaddressed. The latter include taxes and fees that companies and countries must pay to the ISA, notably an application fee for required permits, an annual fixed-fee and royalties payments. Likewise, the Agreement does not try to alter the ISA's authority to redistribute such revenues to other countries on the basis of "equitable sharing," with special emphasis on developing nations – *in other words, the kind of socialist, global wealth-redistribution scheme that Mr. Reagan viscerally opposed*.
- **LOST's Regulatory Burdens:** The 1994 Agreement does little to address President Reagan's concerns about the Law of the Sea Treaty's regulatory burdens. For example, the ISA still maintains the right to adopt "appropriate rules, regulations, and procedures for...the prevention, reduction and control of pollution and other hazards to the marine environment," which would undoubtedly impose significant costs on American businesses and promote big (supranational) government.

Taken altogether, **it is a canard to claim that the problems with the Law of the Sea Treaty that prompted President Reagan to reject it have been "fixed."** To the extent that the 1994 Agreement has any force and effect, it addresses only *some* of Mr. Reagan's concerns. That accord does not even *purport* to alter much of what the President found unacceptable in this supranational government-empowering treaty. **Insofar as the Agreement does not actually amend even those parts of LOST that it *does* address, it is misleading to contend that the Treaty would now be acceptable to Ronald Reagan – or that it should be to those who share his vision and values.**

LOST and the United Nations

Some Treaty proponents insist that the Law of the Sea Treaty does not involve, let alone unwisely empower, the United Nations. Such claims try to dismiss the fact that the accord's official name – "United Nations Convention on the Law of the Sea" – correctly indicates otherwise. In fact, the "world body" at Turtle Bay has played a decisive role in giving birth to the Treaty's preparation via UN-sponsored negotiations and, subsequent to its entry into force, in LOST's administration and implementation.

The official title also reflects the fact that the LOST's various international governmental agencies are modeled after, and work in much the same manner as, the UN

and associated multilateral institutions. In some respects, however, the Treaty departs from past practice by conferring on its agencies unprecedented powers – notably for mandatory dispute resolution and for the management of vast natural resources for which those agencies are given responsibility.

Since the Law of the Sea Treaty entered into force two decades ago, LOST's executive, legislative and judicial entities have largely operated in obscurity and, with a few exceptions, in uncontroversial ways. The question occurs: Would U.S. accession to LOST precipitate changes in the conduct of the Treaty's agencies? Would the result be the emergence of a formidable new international entity? In the process, would the influence and power of the UN and other supranational organizations be enhanced at the expense of nation-states like ours? The answers to these questions can be derived from the following facts:

- **The Law of the Sea Treaty and its agencies are indisputably linked to the UN, both substantively and organizationally. *What benefits one, benefits the other.***
- On the substantive plane, **other UN agencies routinely promote treaties and regulations designed to build on and reinforce LOST's importance and the authority of its agencies.** A recent example is instructive: A report of a UN review conference on progress between 2004 and 2006 in the implementation of the Convention on Biological Diversity “recognizes the United Nations General Assembly's *central role* in addressing issues relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction.”

The report goes on to “recall that United Nations General Assembly Resolution 60/30 emphasized the *universal* and unified character of the United Nations Convention on the Law of the Sea, and reaffirmed that the United Nations Convention on the Law of the Sea sets out the legal framework within which *all* activities in the oceans and seas must be carried out, and that its integrity needs to be maintained, as recognized also by the United Nations Conference on the Environment and Development....” (Emphasis added throughout.)

- **At a practical level, the ties between the UN and LOST are no less palpable.** For example: All staff associated with LOST bodies are paid by the UN system. Day-to-day monitoring of activities regulated by LOST is conducted by UN staff employees. Employees of LOST-related agencies participate in the UN pension plan. And, under the terms of the Treaty, the UN Secretary General plays a direct role in choosing the fifth arbiter for five-person special arbitral tribunals that will hear disputes between parties to LOST. He also is responsible for convening conferences to amend the Treaty.

A U.N. ‘on Steroids’

Hard experience argues against further empowering the United Nations and its affiliates. The UN has a long, *and sordid*, track-record of engaging in or endorsing

behavior and policies that are antithetical to the interests of the United States and other freedom-loving nations. Such behavior and policies are generally the product of majorities of member-states, like-minded, unaccountable international bureaucrats and non-governmental organizations. They conspire to use the General Assembly's absurd one-nation/one-vote rules to translate shared hostility towards America and its fellow developed nations into policies that vilify the West and seek to redistribute the world's power and wealth to the developing world.

A small sample of this reprehensible conduct would include: the Oil-for-Food scandal; the infamous "Zionism is Racism" resolution; the creation of the UN Human Rights Council on which countries such as Cuba, China, and Saudi Arabia are allowed to serve; and the convening of the 2001 World Conference against Racism in Durban, South Africa – an event that was nothing more than a forum for anti-Semitism and Israel-bashing. The UN is now preparing a follow-up to the 2001 Durban conference, with *Libya* chairing the planning committee, and *Iran and Cuba* serving on the committee as well.

LOST's Transnationalist architects have long sought to build up supranational agencies. This treaty allows them to do so in unprecedented ways by: conferring on LOST "organs" responsibility for regulating seven-tenths of the planet (i.e., the world's oceans and the vast natural resources to be found in and below them); levying what are tantamount to international taxes; and imposing mandatory and un-appealable decisions in disputes that may arise involving parties to the Treaty.

To date, the full, malevolent potential of the Law of the Sea Treaty has been more in prospect than in evidence. **Should the United States accede to LOST, however, it is predictable that the Treaty's agencies will: wield their powers in ways that will prove very harmful to American interests; intensify the web of sovereignty-sapping obligations and regulations being promulgated by this and other UN entities; and advance inexorably the emergence of supranational world government.**

It may be that the only check on such undesirable outcomes is for the United States to remain a non-state party to LOST. The latitude such an arrangement affords America to observe Treaty provisions that are unobjectionable – without being bound by those that are – may not only be preferable for *this* country and its vital interests. It could also help spare other nations the less free, less prosperous and more onerous international order that will emerge if the Transnationalists have their way on the Law of the Sea Treaty.

LOST's Compulsory Dispute Settlement

If, on the other hand, the United States were to become a state party of LOST, this country will find itself subject to a dramatically different situation – even with respect to navigation from that applied by the previous, 1958 convention. Specifically, **in the event of disputes, America will be obliged to submit to mandatory settlement mechanisms.**

These apply not just to issues involving the maritime “rules of the road,” but to *any ocean-related disputes that state parties cannot resolve on their own.*

In fact, nations are required – at the request of either of the disputing parties – to submit the dispute for resolution by one of several international tribunals: (1) The International Tribunal for the Law of the Sea (ITLOS), (2) an arbitral tribunal or (3) a special arbitral tribunal. Another option is the International Court of Justice (ICJ). If the parties to the dispute cannot agree on a mechanism, the dispute automatically goes to an arbitral tribunal for resolution. **Decisions made by any of these bodies are *binding upon the disputants, and such decisions cannot be appealed.***

The question is: How will mandatory dispute resolution affect U.S. interests?

Proponents of the Treaty claim that in the event of disputes, the United States will avoid potential problems with international courts by choosing either arbitration or special arbitration as the dispute mechanisms. The implication is that such an arrangement thereby assures decisions amenable to U.S. interests.

LOST supporters also insist that military activities will be exempted from consideration by any of the Treaty’s tribunals and that it will be exclusively up to the United States to determine what constitutes such an activity.

Mr. Chairman, **few aspects of this complex treaty require closer scrutiny than these contentions. If the proponents are wrong about how dispute resolution will work, the grounds for rejecting the Law of the Sea Treaty are clear-cut.**

- For starters, **LOST’s advocates in the Bush Administration are right to be worried about international courts given the track record of such panels** (particularly the ICJ) in which they have proven to be highly politicized and generally very hostile to American interests.

Unfortunately, **the appointment procedures that would apply to the “swing” arbiters in both the regular and special arbitration panels are likely to assure a similar stacking of the deck against the United States.** In regular arbitration, each party chooses one panelist, and the three remaining panelists are chosen by the President of the Law of the Sea Tribunal. As noted above, in “special arbitration,” each party chooses two panelists, and the remaining panelist is chosen by the Secretary General of the United Nations.

Worse yet, the State Department has acknowledged that **arbitration panels would likely look to decisions of the Tribunal to inform their own rulings.** As a practical matter, this means that, were the United States to become a party to the Treaty, it would not be able to escape the reach of the Tribunal – despite its determination to forum-shop by choosing arbitration.

- **Equally flawed is the proponents’ insistence that Law of the Sea Treaty tribunals will be unable to interfere with U.S. military activities.** Although LOST exempts “disputes concerning military activities” from the purview of its dispute resolution mechanisms, *the Treaty does not define “military activities.”*

Proponents of LOST argue that the United States can make a declaration that it will define “military activities” for itself. However, **this amounts to a reservation to the treaty, which is expressly prohibited by LOST. LOST must be accepted or rejected in its entirety.** Furthermore, if the U.S. military were allowed to make such a unilateral determination under LOST, the militaries of other nations would exercise the same option, creating an anarchic situation that would defeat the purposes of LOST altogether. LOST was clearly *not* intended to allow this to happen.

- These considerations, combined with the Treaty’s sweeping environmental obligations, give rise to circumstances in which **U.S. Navy and perhaps other military services, their contractors or suppliers seem virtually certain to find themselves embroiled in one or another of LOST’s dispute resolution mechanisms.** For example, the Navy’s use of high-powered sonars would certainly be characterized by Washington as a military activity. But the Navy could well be forced to defend the use of such sonars before an unfriendly LOST panel on the grounds that it has harmed the “marine environment,” by killing whales or dolphins.
- Worse yet, **in the event of any dispute over whether an activity is military in nature, the tribunals created by LOST are permitted to make that determination themselves.**

The mandatory and rigged nature of the dispute resolution mechanisms are one of the most important reasons why **the United States will be better served by continuing its practice over the past twenty-five years – namely, voluntarily observing those parts of LOST that it finds unobjectionable, but remaining unencumbered by the obligations that are.**

LOST’s Negative Security Implications

The Law of the Sea Treaty’s compulsory dispute resolution requirements and procedures are particularly problematic when taken together with a **number of obligations the accord entails that are at odds with our military practices and national interests.** These include commitments that:

- **Reserve the oceans exclusively for “peaceful purposes”** (Article 88): The United States routinely uses the world’s oceans for military purposes, including waging war against our enemies.
- **Require states to refrain from “the threat or use of force against the territorial integrity or political independence of any state”** (Article 301): As the world’s preeminent maritime nation, America must project power from the sea and does so

with some regularity. Some would describe such power projection as contrary to “the territorial integrity or political independence” of states (most recently, for example, attacks from naval forces against the Taliban’s Afghanistan and Saddam Hussein’s Iraq).

- **Proscribe the use of territorial waters to collect intelligence and conduct other operations** (Article 19): For many decades, intelligence vital for American security has been collected on, below and above the oceans – including, in some cases, those considered to be “territorial waters.”
- **Oblige submarines to travel on the surface and show their flags in territorial waters** (Article 20). The effectiveness and perhaps the very survival of our submarines would be compromised were they to have to operate on the surface in close-in waters where they can only go with the greatest of stealth.
- **Bar any maritime research except that conducted for peaceful purposes and require the coastal state’s permission for that performed in territorial waters** (Article 240). Classified oceans research, including some conducted covertly, is indispensable to the U.S. Navy’s mission.

In statements in support of LOST, the United States military makes clear that it has *no intention of ending such activities*, and insists that it will not have to do so since “military activities” are exempted from the Treaty’s dispute resolution mechanisms. Unfortunately, **this position both defies common sense and hard experience with international accords: These articles are wholly without effect if they do not apply to the military and it is predictable that America’s foes will use every opportunity afforded by LOST to ensure they do.**

LOST’s proponents also note that some of these restrictions are similar to provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone (1958 Treaty) to which the United States is already a party.

To make such representations, however, is to ignore *the critical difference* between the 1958 Convention and the Law of the Sea: **As a state party to LOST, the United States will be subject to the Treaty’s international tribunals and their authority to interpret and enforce the Treaty’s obligations in connection with “any dispute concerning the interpretation or application of this Convention.”** It bears repeating that the outcome of such dispute settlement is binding on the parties to the dispute.

Even though LOST permits a state party to declare “disputes concerning military activities” to be exempt from dispute settlement, such a declaration would very likely be the beginning of the process, not its end.

As I have noted earlier, the Treaty does not define “military activities.” **At the very least, therefore, were the United States freely to assume the foregoing**

obligations, it would set the stage for injunctions, or other adverse rulings, against the U.S. military to be sought from one LOST dispute resolution agency or another. Given the stacked-deck nature of these mechanisms, it is far from certain that our opponents will fail.

This applies in spades to things we consider to be **“military activities” but that may well be depicted by our opponents in ITLOS or arbitration proceedings as environmentally harmful activities** (e.g., charges that Navy sonars are responsible for killing whales and dolphins). Importantly, in the event of any disagreement over whether an activity is military in nature, *the Treaty grants to its dispute resolution mechanisms the right to make that determination themselves.*

Even if the military’s own activities were able to be exempted from the Law of the Sea Treaty’s provisions, **it is far from clear that exemption would also apply to all of the companies that comprise, for example, the Navy and Coast Guard’s civilian technology supply chain.** They would certainly not be spared exposure to dispute resolution demanded by other treaty parties or activist groups alleging violations of LOST-imposed obligations to protect the marine environment. For instance, environmental grounds could be used to object to products supplied to the U.S. military by civilian companies or perhaps the industrial and technological processes employed by private sector entities to manufacture and deliver those products to the Navy and Coast Guard.

‘Lawfare’

The U.S. military has enough problems meeting its environmental compliance requirements under *American* statutes. It is almost unimaginable how severe the repercussions could be if it and/or its contractors are subjected to new instruments of “Lawfare” – i.e., legal initiatives carried out to achieve an adverse effect on our armed forces – rooted, for example, in LOST regulations’ application of the “Precautionary Principle.”

Reduced to its essence, this principle prohibits a given activity if it could cause harm. There need not be proof that harm will result, let alone any evaluation of the potential benefits versus the possible costs. The European Union has saddled itself with this principle and has been working for many years to impose it on competitors, notably the United States.

Regulations promulgated under LOST will afford that vehicle, to the huge detriment of American businesses, entrepreneurial innovation and economic activity. The Precautionary Principle could also have the effect of denying the Navy and Coast Guard valuable technologies needed to maintain their military preparedness, with negative effects on mission performance.

In short, as a general rule, it is an ill-advised practice for democratic nations to make promises pursuant to international treaties that they do not intend to

honor. That is especially true, however, in circumstances where Federal judges may just demand compliance on the basis of the rulings of LOST's tribunals.

LOST and Technology Transfer

The Law of the Sea Treaty requires extensive transfers of data and technology – at least some of which could be highly detrimental to America's industrial competitiveness (including in fields far removed from maritime-related activities) and to the national security. For example:

- LOST's **Article 266** mandates that states “cooperate in accordance with their capabilities to **promote actively the development and transfer of marine science and marine technology** on fair and reasonable terms and conditions” and “endeavor to **foster favorable economic and legal conditions for the transfer of marine technology.**”
- **Article 268** requires states to “**promote the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data.**”
- **Article 269** calls for parties to “establish **programs of technical cooperation for the effective transfer of all kinds of marine technology** to States which may need and request technical assistance.” (Emphasis added.)
- Compulsory dispute settlement mechanisms afford further opportunities to obtain sensitive technology and information. **Article 6 of Annex VII** requires that parties to a dispute “**facilitate the work of the arbitral tribunal and...provide it with all relevant documents, facilities and information.**” It can therefore be expected that countries may bring the United States or its businesses before arbitral tribunals – without expectation of a favorable result, *solely for the purpose of obtaining sensitive technology information.*

The object of these provisions is consistent with the socialist, redistributionist and one-world vision that animated many of LOST's negotiators: No matter what the costs may be to U.S. security and business interests, the fruits of marine research, exploration and exploitation of “the Area” – the waters covered by the Treaty – and the associated technology must be shared with developing nations, land-locked states and “geographically challenged” countries.

Some of the technologies in question are most sensitive. They include: underwater mapping and bathymetry systems; reflection and refraction seismology; magnetic detection technology; optical imaging; remotely operated vehicles; submersible vehicles; deep salvage technology; active and passive acoustic systems; bathymetric and geophysical data; and undersea robots and manipulators. Many of these technologies are inherently “dual-use,” having both military and civilian applications. Their military

applications include: anti-submarine warfare; strategic deep-sea salvage; and deep-water bastions for sub-surface launching of ballistic missiles.

The effect of mandatory sharing of such technology could directly benefit not only this country's economic competitors. It could also help America's military adversaries, both actual and potential.

The so-called “fixes” with respect to technology transfer obligations contained in the 1994 Agreement do not alter this reality. As noted above, in the first place, the Agreement could not and did not amend the Treaty. Secondly, even if it had done so, the Agreement did not purport to modify *all areas* in which information and technology transfers are required. For example, all relevant information about deposits and geology must still be provided to the International Seabed Authority's “Enterprise” in order to apply for a permit to develop seabed resources, together with the technology necessary to exploit such resources.

The United States is the nation with the most to lose – from an economic and national security point of view – from the sort of obligatory technology transfer provisions contained in the Law of the Sea Treaty, including those that would be binding even if the 1994 Agreement has effect.

America has long imposed **unilateral export control restrictions** precisely for the purpose of preventing transfers that will result in harm to this country. **U.S. accession to LOST would require a substantial liberalization, if not wholesale scrapping, of such important self-defense measures.**

Actual or potential competitors/adversaries like **China, Russia, state-sponsors of terror** and even **European “allies”** understand full well what a technology windfall U.S. adherence to LOST could represent. **It would be irresponsible, not to say foolish in the extreme, to believe that none of these parties will take advantage of the opportunity to reap that windfall, to our very considerable detriment.**

LOST Can be Used to Limit the Proliferation Security Initiative

A particularly contentious question involves the impact the Law of the Sea Treaty could have on the Proliferation Security Initiative (PSI), a multi-country arrangement launched in 2003 for the purpose of permitting the United States and other participants to stop foreign vessels suspected of transporting weapons of mass destruction “in their internal waters, territorial seas, or contiguous zones.”

PSI is one of the most effective tools the U.S. government has employed to try to stop the transfer of WMD and their delivery systems. Proponents of the Treaty point out that most of those with whom we partner in the PSI are Treaty members and cite LOST as justification for their participation.

Yet, the Law of the Sea Treaty provides only a handful of exceptions to the right of “innocent passage” afforded vessels in these waters. Specifically, **LOST’s Article 110 only permits such intercepts in four instances: piracy (i.e., the ship is flying no national flag), slavery, narcotics trafficking and unauthorized radio broadcasting.** In addition, LOST provides government-owned ships operating on the high seas complete immunity from the jurisdiction of any foreign country. Since most terrorist-sponsoring nations and their totalitarian enablers have state-owned merchant marines, the Treaty can thus be used to protect proliferation activities on the high seas.

PSI is *not* compatible with LOST, despite proponents’ claims to the contrary. As a treaty, LOST is binding international law on the parties, whereas PSI is only an informal arrangement between certain nations, and carries no force as international law. The argument that PSI can be executed within the rules of LOST, even though LOST clearly prohibits boarding actions critical to PSI, ignores the fact that LOST outranks PSI in the hierarchy of international law.

As a result, unless one or more of the Treaty-approved circumstances for an at-sea intercept applies, LOST member states could be precluded from participating in such an action – even when there might be compelling evidence that nuclear or other WMD or their delivery systems were on board. **As long as the United States continues not to be a LOST state party, it can always act unilaterally. That option, however, will be foreclosed, and our security possibly endangered as a result, if the Senate consents to the Treaty’s ratification.**

In this connection, it must be noted that the Chinese and Russians have strenuously objected to the Proliferation Security Initiative, claiming that it violates LOST. They can be expected to seek mandatory dispute resolution of the matter should the United States become a state party. Should the ruling go against us, a critical tool in the nation’s effort to prevent the spread of nuclear, chemical and biological weapons and their delivery systems could be lost for good.

LOST as an Unsatisfactory Precedent for Other ‘International Commons’

The Law of the Sea Treaty’s stated purpose is the establishment of a “legal order for the seas and oceans.” Animating that goal is the proposition that such waters are the “common heritage of all mankind.” To govern, protect and preserve this “international commons,” LOST establishes rules with respect to: navigation of the oceans, marine research, protection of the marine environment and deep seabed mining, among other oceans-related issues.

LOST also contains provisions outlining overflight rights *over* various parts of the ocean. In other words, it confers – not to be confused with *recognizing or acknowledging* – sovereign rights to territorial waters and their seabeds. The Treaty also claims to apply to the airspace above them.

As discussed previously, LOST establishes supranational agencies associated with the UN to manage the world's waters, seabeds and airspace. Their role is to administer the maritime "international commons," implement the Treaty's various provisions and resolve disputes between state parties as to the application of those provisions. If the disputing parties fail to reach an agreement on their own, they are required to submit to the jurisdiction of one of the LOST tribunals.

In addition, parties to LOST must make payments in various forms to one of the LOST bodies, the International Seabed Authority (ISA), in order to engage in deep seabed exploration and exploitation. These amount to a form of international taxation intended, among other things, to underwrite the operations of the ISA and the Treaty's other "organs."

It is important to consider as part of the debate over U.S. accession to the Law of the Sea Treaty whether that action would have implications for other so-called "international commons" such as Antarctica, the moon, Outer Space more generally and the Internet.

In fact, the logic of LOST – with its supranational order for the control of a medium used by more than one country – will inevitably be seized upon by America's foes to demand similar arrangements be instituted for Outer Space or even the Internet. And U.S. ratification of LOST will make it difficult for the United States to argue against accepting binding arrangements for other "international commons." It was for this reason that President Reagan's Ambassador to the UN, the late **Jeane Kirkpatrick**, warned the Senate in 2004 not to consent to ratification of LOST, in part on the grounds that America's interests in Outer Space could be adversely affected by the LOST precedent.

LOST and Space Control

It is of particular concern that the LOST model could be used to cripple America's use of space for national defense. America's military and intelligence communities have increasingly relied – in fact have become heavily dependent – upon space assets to gather information and support terrestrial forces. Far-sighted U.S. strategists appreciate that space can only become ever-more-important as a theater of operations, with control of activities (commercial as well as military) on earth being determined by control of space.

This country's adversaries recognize this reality, too, and are attempting to inhibit our use of space – in some cases through active means, in others via the imposition of international laws and regulations (another example of "Lawfare"). **U.S. endorsement of LOST would establish a precedent that would undercut American efforts to stave off the latter effort.**

LOST and the Internet

The same is likely to true of the Internet – an immeasurably important engine of American technological and commercial competitiveness and, increasingly, a key component of U.S. national security. Other countries have already demanded *global* Internet regulation. For example, in March 2005, China’s ambassador to the United Nations called for international management of the Internet. Seven months later, the UN hosted a conference at which many delegates insisted on an end to this country’s exclusive control over the assignment of web addresses and e-mail accounts, in favor of having such roles performed by one or more UN agencies.

The problems with such an arrangement are obvious. The *Washington Post* pointed out that any such agencies would inevitably be caught between free societies that want low barriers to Internet access, and countries such as China and Saudi Arabia, that insist on limiting access. The *Post* went on to observe: **“These clashes of vision would probably make multilateral regulation inefficiently political.”** As it happens, the same is true of LOST – and would certainly apply with devastating effect to the Internet if LOST becomes the template for multilateral management of the ether’s “international commons.”

LOST and Russia’s Arctic Gambit

Before concluding, let me say a few words about the implications for Senate consideration of the Law of the Sea Treaty associated with Russia’s August 2007 depositing of a titanium flag on the floor of the seabed of the North Pole. By so doing, the Kremlin sought to publicize its claim to the Lomonosov Ridge, an underwater ridge that Russia claims is a natural part of its continental shelf. If recognized, such claims would entitle Russia to natural resource and energy rights in much of the North Pole region.

Russia is asserting these rights via a mechanism of LOST. A state party can claim an extension to its continental shelf – and therefore extend its Exclusive Economic Zone (EEZ) – if that state can provide evidence to the Commission on the Limits of the Continental Shelf (a LOST “organ”) showing a natural extension of the shelf as part of its territory.

Russia’s claims are completely without technical merit. The Lomonosov Ridge is *not* an extension of Russia’s continental shelf. Rather, it is a separate geological formation not connected to the Russian shelf and, therefore, providing no basis for Moscow’s territorial claims. Even the Law of the Sea Treaty itself explicitly states that a country’s continental shelf “does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.”

Proponents of the Law of the Sea Treaty have asserted that the United States must become a party to LOST if it is to prevent Russia from making off with the valuable resources of the Arctic seabed. This contention is contradicted by previous experience,

however: Russia made a similar claim before the Commission in 2001. Although not a party to the Treaty, the United States provided data to several nations who shared its interest in challenging the Russian assertions, prompting the Commission not to accept them at that time.

Given the baseless nature of the Russian bid, it is entirely possible that Moscow hopes not only to gain access to the Arctic's undersea wealth but to **provoke the United States into joining LOST – a treaty that is disadvantageous to the United States.** As indicated above, LOST was created by the Soviet-era Kremlin and its allies in the Third World as a means of promoting supranational government mechanisms they could control at the expense of their American and other Western adversaries. LOST's agenda of global wealth redistribution and its negative implications for American sovereignty and U.S. military and economic equities continues to serve Moscow's interests, but not those of the United States.

The Continental Shelf Commission

The extent to which LOST will prove an asset to our foes is indicated by the conduct of the Continental Shelf Commission in this instance. Given the geological realities and the Treaty's own terms, **the willingness of the Commission even to consider Russia's claims to the Arctic seabed is indicative of a serious problem with LOST.** The Commission is blatantly ignoring a clear provision of LOST – a troubling indicator of what the U.S. can expect from LOST tribunals.

Since LOST explicitly declares that a country's continental shelf does not include underwater ridges, the Commission's readiness once again take up the Russian case begs the question: As so often happens in UN agencies, **will political considerations influence the outcome?**

The Commission currently has only two Arctic members, Russia and Norway. A simple majority vote by non-Arctic states – perhaps engineered by Russian pressure and/or bribes – could result in decisions that would be binding on all member nations. If the United States were a state party to LOST, it would likely still be outvoted, yet be obliged to accept the Commission's unsatisfactory dictates.

In this case, **the consequences of such a decision would be preposterous – even absurd:** Russia would have *sole economic rights* to the vast natural resources of the central Arctic Ocean. This would essentially give Russia a virtual monopoly over the North Pole region.

Acceptance of Russia's claim would, moreover, invite other countries to make similarly ludicrous claims. If Russia can assert its ownership of a submerged mid-ocean ridge, then Iceland and the Azores would have grounds to stake claims to most of the North Atlantic's seabeds, since those islands are an integral part of the Atlantic mid-ocean ridge. The same argument could be made by any one of the numerous island countries that are part of an undersea ridge complex.

The United States was able to play a role in the Commission’s non-acceptance of Russia’s first claim to the Arctic seabed back in 2001, even though it was not a party to LOST – and, therefore, not at risk of being bound by adverse Commission decisions. This episode demonstrates that, by remaining outside of the Treaty, America can retain its freedom of action (including the use of bilateral diplomacy and more constructive multilateral mechanisms, such as the Arctic Council) and still challenge such over-reaching Russian claims *and win*.

Conclusion: LOST is a Threat to American Sovereignty

Mr. Chairman, permit me to conclude this bill of particulars by underscoring one of the most troubling aspects of the Law of the Sea Treaty: The stated ambition of its architects to promote a supranational government for 70% of the world’s surface (i.e., the oceans and their seabeds).

Prominent among such architects was **the World Federalist Association** (now known as **Citizens for Global Solutions**). In an undated white paper on their website, these advocates for world government declare: **“An organization is already in the process of being developed to control the exploitation of ocean resources, and similar agencies could be created to govern Antarctica and the moon.”**

The Citizens for Global Solutions posting goes on to say: **“By means of these voluntarily funded functional agencies, national sovereignty would be gradually eroded until it is no longer an issue...Eventually, a world federation can be formally adopted with little resistance.”** (Emphasis added.)

This strategy of garroting national sovereignty would be advanced by LOST in several ways. By way of recap, these include:

- **LOST entails obligations at odds with our national security strategy and operations.** These obligations may be enforced by the Treaty’s mandatory dispute resolution mechanisms that are stacked against the United States.
- **LOST involves unprecedented *environmental obligations*.** These can be used to interfere with the exercise of U.S. sovereignty on the grounds that what is being done on American *soil* or in its *airspace* will have negative repercussions for the oceans. Such obligations go far beyond the Kyoto accords and could entail substantial costs.

For example, steps taken to resuscitate **New Orleans** in 2005 by **pumping untold quantities of toxic waste out of Lake Pontchartrain into the Gulf of Mexico** could have been prohibited by an edict from a LOST agency. Such a ruling could then have been enforced by U.S. courts increasingly acting under the sway of international tribunals and treaties.

- **LOST empowers an unaccountable, unrepresentative international agency for the first time to collect what amount to taxes.** The UN is already insufficiently transparent and ever-more-hostile to U.S. interests. Institutionalizing arrangements that would allow it and other supranational organizations to become self-financing can only exacerbate these trends. (Such a step – and the ominous precedent it sets – are, moreover, an affront to a nation whose genesis was rooted in the principle of “no taxation without representation.”)
- **LOST will allow interference with and the penalization of American businesses, including those that conduct research for, equip and provide logistical support to the U.S. military.** It will: impose the “**Precautionary Principle**” (according to which innovations cannot be introduced unless proven free of any adverse consequences); give standing to **Alien Torts claims** in U.S. courts; require **sharing proprietary information and technology** with international bureaucrats and competitors; **compromise WTO rights**; and give **precedence to European-dominated international standards**. The costs of such derogations of our sovereignty could be high, perhaps even crippling, for affected businesses – including those supporting our armed forces.
- **Finally, this accord will establish problematic precedents for “managing” other, no-less-strategically-important “international commons,” including Outer Space.** A number of America’s adversaries have long sought to impose arms control or other treaty arrangements that could make it more difficult if not, as a practical matter, impossible for the United States to maintain the access to and control of space required by our national security interests. If this country joins LOST, it will invite these adversaries to adapt the Treaty’s International Seabed Authority as a prototype for determining permissible and impermissible activities in space – likely in ways that will prove inconsistent with the United States’ military and intelligence requirements.

Inevitably, American ratification will be a major step towards the one-worlders’ agenda of global, supranational government. One prominent Transnationalist, **Arvid Pardo**, the former Maltese Ambassador to the UN who is credited with coining LOST’s leitmotif phrase “the common heritage of mankind,” has said that **American acceptance of LOST “however qualified, reluctant, or defective, would validate the global democratic approach to decision-making.”** On that score, at least, Pardo is absolutely right.

Many of the rights of navigation and overflight that LOST supporters claim are “assured” by the Treaty and so valuable to U.S. security are, in fact, already enjoyed thanks to existing, well-functioning international agreements to which the United States *is* a party.

The majority of those rights are derived from customary international law, much of which was put in place long before LOST was ever negotiated. To the extent that LOST has created any new customary international law, these are laws to which we

voluntarily adhere and from which we have benefited since President Reagan rejected the Treaty twenty-five years ago – *without being subject to LOST's other, high costs.*

Mr. Chairman, I appreciate the opportunity to explain why I and many other national security-minded individuals strongly oppose the Law of the Sea Treaty and urge its rejection by the Senate. I pray – for the good of our country, our national security and economic interests and our sovereign, constitutional form of government – that you and your colleagues, and our countrymen, will become familiar with these concerns *before* you are asked to consent to this ominous and irremediably defective accord.

Should that not happen, it will be in no small measure because of a serious dereliction of duty on the part of the U.S. Senate – one that has resulted in this being the only hearing in which critics have been allowed to testify, where only two of us have been heard from and in whose course each of us has been confined to five minutes of oral remarks. I call on you, Mr. Chairman, the members of this Committee and those of other relevant Senate panels to ensure that such a travesty does not eventuate.