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Commentary

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LOST and found

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Lawrence Kogan - The Law of the Sea Treaty, a k a "LOST," *the* leviathan of all U.N. regulatory and environmental treaties, has again reared its ugly head, despite having been "deep-sixed" years ago by the Reagan administration.

A legacy-oriented White House is now shepherding it through a Congress whose majority enthusiastically embraces collectivist European-style environmental activism and multilateral treaty-making — at the expense of constitutionally-protected individualism and property rights.

Is the White House merely ill-informed, or has it intentionally chosen to ignore the lessons of history? Does it not recall the past decade of highly contentious trade disputes between the United States and an environmentally-obsessed and protectionist European Union, which operates on what is known as the "precautionary principle" — "I fear, therefore I shall ban."

Does the Bush administration not realize that treaty proponents now seek to have this controversial political philosophy read into the LOST as an irrefutable international legal standard, so the United States will be compelled to adopt it as domestic law too?

Homeland Security Department Operations Director Roger T. Rufe, Jr., a retired U.S. Coast Guard vice admiral and a former head of the Ocean Conservancy, is a LOST supporter and a big fan of the precautionary principle. In congressional testimony, Mr. Rufe acknowledged the idea did not exist when the sea treaty was first negotiated. "Fortunately, the convention as a constitution does establish some principles and tools that may provide a framework for future application of the precautionary principle," he said. Pro-LOST lawmakers like Sen. Richard G. Lugar, Indiana Republican and former Senate Foreign Relations Committee chairman, have even called the treaty a new "constitution for the world's oceans."

Also, World Wildlife Fund representative Brooks Yeager previously testified that LOST tribunals could be used to have the precautionary principle read into the treaty without requiring a change in domestic law.

Please forgive me if I am being overly "precautious," but, my former law professor, LOST expert Bernard Oxman, recently admitted in a frank conversation that the U.S. would be incapable of preventing LOST treaty partners such as Europe from employing the precautionary principle against our national interests for the foreseeable future. If this is true, why is LOST ratification

necessary now? Shouldn't Americans properly prepare themselves *before* ratifying the LOST? Isn't the Constitution the "supreme law of the land," our territories and our territorial waters, including the continental shelf?

Are not our exclusive private property rights protected by the Fifth Amendment from unreasonably compensated regulatory "takings," outright expropriations and international taxation, whether from our own government, foreign governments or the International Seabed Authority established under LOST?

And, what other U.N. environmental treaties, regulations and international standards susceptible to EU reinterpretation must the United States be concerned about? How much more of the LOST regulatory iceberg lurks below the ocean's surface?

If ratified by the United States, LOST would likely expose U.S. small and medium-sized companies, individual citizens and the U.S. military's civilian technology supply-chain to significant new costs and burdens.

In particular, private property and due process rights would be lost. Sophisticated military and civilian technologies could be banned, restricted or taxed by domestic and international bureaucracies not subject to U.S. control or oversight, if it can somehow be shown they pose some possible future hazard to the marine environment.

In addition, the United Nations and its tribunals would govern the status and scope of intellectual property rights underlying products and processes derived from sea-based discoveries, rather than the World Trade Organization or the World Intellectual Property Organization. The United States could lose its global economic competitiveness, and, more importantly, its national sovereignty.

What is really going on here? Why have LOST supporters not explained to the American people the costs, risks and benefits associated with ratifying the treaty, or the nuances of the LOST ratification process itself? What are they afraid to tell us?

As the ultimate representative of the American people, Congress must hold open hearings on LOST ratification before the Senate gives its advice and consent. It must educate Americans about how the expansive LOST regime, as it will likely be implemented by the United States, the United Nations and foreign governments, would directly and indirectly affect their pocketbooks, their rights and their daily lives.

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