THE AMERICAN SPECTATOR

LOST at Sea

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Published 6/20/2008 12:07:20 AM

Like a monster in a horror flick franchise, the Law of the Sea Treaty (LOST), an omnibus treaty originally blocked by President Ronald Reagan, is back! And despite what the doomsday document's delirious spokesmen say, it's about as scary as ever.

The convention is being pushed by a mix of activists, who support international law -- any international law -- and businesses, such as the International Association of Drilling Contractors, that see visions of profits dancing in their boardrooms. Treaty critics are being dismissed as ignorant fools or cynical liars.

LOST covers navigation, environment, seabed mining, and more. It offers a few benefits, but they have been widely exaggerated. Boosters are bragging that the treaty would strengthen navigation rights. But the difference would only be marginal, since the treaty simply codifies customary international law.

Most countries have an interest in maintaining free navigation. If a nation believes it to be in its interest -- and within its capability -- to interdict commercial or military shipping, it isn't likely to waste time parsing LOST articles before acting.

The Treaty's downsides remain. The seabed mining provisions were renegotiated in 1994, but the treaty was not "fixed." The convention, originally intended to promote large-scale income redistribution to Third World states, creates an International Seabed Authority (ISA) to regulate ocean mining and the Enterprise to mine for the ISA.

The system is byzantine in its complexity and inefficiency.

THE RENEGOTIATED text only moderated LOST's infirmities. Now, the U.S. has been given a seat on the Council of the ISA, but it possesses no veto, unlike the UN Security Council.

The Council operates by "consensus," but under the Treaty this only means the ISA must strive to overcome disagreements before moving forward. Had "consensus" really meant consensus as commonly understood, the Treaty itself

could never have been approved over U.S. objections.

Similarly, the agreement retains part of the original requirement for mandatory technology transfers. Article 144 directs that the Authority shall "promote and encourage the transfer to developing States of such technology and scientific knowledge."

Moreover, the Authority and States Parties "shall initiate and promote" programs "for the transfer of technology to the Enterprise and to developing states," including "facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions." The revised text also adds new provisions that easily could be interpreted to require the same sort of technology transfers originally specified in the version that the U.S. rejected, such as the requirement that governments "ensure that contractors sponsored by them also cooperate fully with the Authority."

Equally bad, LOST could be treated as self-enforcing, that is, found to create obligations enforceable by U.S. courts. In *Medellin v. Texas*, the U.S. Supreme Court recently rejected a challenge to a criminal conviction for failure to fulfill the Vienna Convention on Consular Relations. The majority ruled that it does not constitute "directly enforceable federal law."

Treaty advocates make the same claim for LOST. However, Annex III, Article 21(2) states that LOST tribunal decisions "shall be enforceable in the territory of each State Party." And in *Medillin* Justice John Paul Stevens contrasted the Vienna Convention with LOST, which he opined ***did*** "incorporate international judgments into international law."

The issue isn't going to be settled until a suit is filed under LOST, if the U.S. is foolish enough to ratify the Treaty.

INDEED, SOME PROPONENTS are almost gleeful about the treaty's many opportunities for new litigation. William C.G. Burns, a professor at Monterey Institute of International Studies, denounced America's refusal to ratify the Kyoto Protocol on global warming.

Burns noted that "several States and peoples in recent years have begun to contemplate, or have taken active steps to initiate, actions against States or private actors" in a variety of international forums, including the LOST, which, he contends, "may prove to be one of the primary battlegrounds for climate change issues in the future."

He cites the Treaty's expansive definition of marine pollution, writing that "the

potential impacts of rising sea surface temperatures, rising sea levels, and changes in ocean pH as a consequence of rising levels of carbon dioxide in sea water" could "give rise to actions under the Convention's marine pollution provisions."

"While very few of the drafters of [the Treaty] may have contemplated that it would one day become a mechanism to confront climate change, it clearly may play this role in the future. At the very least, the spectre of litigation may help to deepen the commitment of States to confront the most pressing environmental issue of our generation," Burns wrote.

By being publicly honest, Professor Burns violated the earlier injunction from Bernard Oxman, a long-time LOST supporter at the University of Miami. Writing in the European Journal of international Law in 1996, Prof. Oxman warned that "global ratification [of LOST] is by no means assured."

Thus, Oxman explained, it was important for advocates not to unduly worry governments about the potential obligations they would be incurring: "this suggests restraint in speculating on the meaning of the convention or on possible differences between the Convention and customary law."

Indeed, he acknowledged that the Convention "is an easy target" because "[l]ike many complex bodies of written law, it is amply endowed with indeterminate principles, mind-numbing cross-references, institutional redundancies, exasperating opacity and inelegant drafting, not to mention a potpourri of provisions that any one of us, if asked, would happily delete or change."

But in Oxman's telling all that mattered was ratifying the Treaty. So it was "essential to measure what we say in terms of its effect on the goal." He explained that "[e]xperienced international lawyers know where many of the sensitive nerve endings of governments are. "Where possible, they should try to avoid irritating them."

ONE OBVIOUS "sensitive nerve ending" is LOST's purported control over land-based pollution. Article 207 of the Treaty directs: "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources."

States also "shall take other measures as may be necessary to prevent, reduce and control such pollution."

Some LOST advocates simply deny the obvious. Deputy Secretary of State John Negroponte last year claimed that there was "no jurisdiction over marine pollution disputes involving land-based sources," directly contradicting the Treaty text.

Others claim that the provision is merely hortatory. Yet Lawrence Kogan, of the Institute for Trade, Standards, and Sustainable Development, wrote an extensive analysis for The *ITSSD Journal*, warning that several provisions created a potential cause of action and could "be used to commence litigation against the U.S." in various international forums.

Still, Treaty advocates contend that such actions would fail. They dismiss a suit by Ireland against Great Britain over domestic-source pollution because of Britain's supposed failure to raise the best defense.

Maybe they are right, but we won't know until their theory is tested. Moreover, argues Kogan, "whether or not an adverse ruling is secured, such other LOST party could help to shape/influence future U.S. governmental legislative and/or regulatory action."

More significantly, it is pretty clear that Treaty supporters are not being straight with the rest of us. The World Wildlife Fund and Don Kraus of Citizens for Global Solutions have told environmentalists that they should back LOST because it could help halt Russian pollution of the Arctic. How can the convention bind Russia but not America?

One Treaty proponent recently sent an email -- which ended up in my hands -- about the consequent difficulty of allaying "conservative fears" of LOST being "some kind of green Trojan Horse."

Supporters of the Convention have a clear agenda. Declared the UN's Division for Ocean Affairs and the Law of the Sea: LOST is not "a static instrument, but rather a dynamic and evolving body of law that must be vigorously safeguarded and its implementation aggressively advanced."

Where might that "dynamic and evolving body of law" end up? Facile assurances from Treaty proponents need to be verified and not trusted. The U.S. Senate has an obligation to answer that question before it ratifies this horror show of a treaty.

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