



## White Paper

# Rejecting the Law of the Sea Treaty (LOST)

**March 13, 2009**

### **About NSS**

*The National Space Society (NSS) is an independent, international, educational, grassroots nonprofit organization dedicated to the creation of a spacefaring civilization. Founded in 1974 by Wernher von Braun, NSS is widely acknowledged as the preeminent citizen's voice on space.*

*The National Space Society's vision is people living and working in thriving communities beyond the Earth. NSS members promote change in social, technical, economic, and political conditions to advance the day when people will live and work in space.*

## Rejecting the Law of the Sea Treaty (LOST)

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### Abstract

The United States Senate must reject the United Nations Convention on the Law of the Sea (UNCLOS or Law of the Sea Treaty – LOST) because it places constraints on commercial development of untapped resources in unclaimed parts of the Earth's oceans. Ratification would set a bad precedent for the future development and settlement of outer space. While the National Space Society (NSS) has little quarrel with most of LOST, Part XI establishes an international regime of approval, oversight, technology transfer, and taxation that interferes with private enterprise to an unprecedented and unnecessary degree. Because LOST is an all-or-nothing treaty, NSS urges the Senate and the President to renegotiate LOST or to continue complying with all of its provisions except Part XI. This paper details how "common heritage" treaties like LOST and the Moon Treaty do not just discourage, but they actually inhibit, development of resources from the unexplored reaches of our world and solar system. These treaties prevent space development in two ways. First, by stating that resources in unexplored places are "the common heritage of all mankind," they ensure that no one person will attempt to develop them privately. Second, resources necessary to the future health of our civilization will be subject to, as well as confiscated and redistributed by the UN, an organization with a long history of opposing the United States. The very future of our civilization will depend upon the resources and technologies gained by exploring new worlds. We should not restrict that future through short-sighted decisions today. Accepting the UN's mandate on future resource development will mean a dimmer future for all – not just the U.S. Free enterprise must be allowed to continue to expand, on this world and others for the sake of our civilization.

### I. The Problem with "Common Heritage" Treaties

One thing that LOST and most of the treaties signed by the UN have in common is the influence of socialism, which was common in the years before the fall of the Soviet Union. In the years since then, the world order has become overwhelmingly capitalist, with only a few hard-line regimes like North Korea, Cuba, China, and Venezuela based primarily upon collectivism.

The common failure of socialist economies was a result of the inability of their governments to match human abilities to opportunities; anticipate individual needs or distribute goods efficiently; or encourage individual efforts at invention or wealth-building. In short, centralized, planned economies could not compete economically with the freedom-based capitalist or mixed economies of the West.

Unfortunately, these UN treaties still reflect the socialist ethos and strategies of the Cold War era, and so are likely to inhibit resource and technology development in the very areas they seek to protect as the "common heritage of mankind."

#### *LOST (1982)*

Most of LOST articulates specific definitions of nations' territorial waters; nations' rights within their territorial waters; and the navigation rights of other nations passing through, under, or

above within those waters. Other issues addressed by LOST include conservation of fishing stocks, environmental protection, and the settlement of disputes between signatory nations.

Part XI of LOST goes a quantum leap farther, addressing the parts of the ocean outside nations' territorial waters. Part XI establishes the International Seabed Authority (ISA), a new UN agency that has authority to approve mining of the deep seabeds, distribute a percentage of sea mining profits to developing nations, and ensure that developed nations share seabed mining technologies with developing nations.

While complying with most of LOST, President Reagan rejected the Treaty in 1982 due to Part XI because LOST subjected the resources of the unclaimed oceans to international control. This control, given the makeup of the LOST Council, was inherently hostile to U.S. interests, and so the Treaty remained unsigned. That said, the U.S. has complied with the remainder of LOST and treated it as standing international law.

President Clinton signed the Treaty in 1994, after the State Department negotiated a series of changes to the Treaty, which reduced the ISA bureaucracy, allowed for both public and private-sector development of the seabed, and lessened to a degree – but only to a small degree – the requirement and burdens of technology transfer. In May 2007, President Bush issued a statement urging the Senate to ratify LOST.

However, the LOST is an all-or-nothing convention, requiring its signatories to adhere to all of its parts upon ratification. And despite the improved parts of the Treaty regarding territorial waters or Exclusive Economic Zones (EEZ), Part XI still subjects the open seas to UN control, with the U.S. having at most a single vote and the right to develop a coalition to prevent our interests from being harmed. The majority of power within the ISA rests in the hands of nations likely to block U.S. interests. And while nations are no longer required to transfer their mining technologies to developing nations, language requesting such transfers remains.

While there are still resources to be exploited within the U.S. EEZ, there might come a time when resources in the unclaimed areas are necessary for the health of the world economy. Private-sector companies, not governments, are most likely to have the technical capabilities to develop those resources, and they will not do so if their future investments are subject to UN approval, competition, taxation, oversight, or even seizure. We would, in effect, be tying the hands of the very people most likely to develop the resources we need.

### *The Moon Treaty (1979)*

In 1979, the L5 Society (a parent organization of the National Space Society) lobbied the Senate to oppose the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, commonly called the Moon Treaty. The National Space Society strongly objected to this language at the time, arguing that the Moon Treaty inhibited sovereignty, freedom, capitalism, and private property. Our stance on this matter has not changed.

Like LOST, the Moon Treaty includes language that describes the resources of the Moon and other celestial bodies as being “the common heritage of mankind.”<sup>1</sup> The specific application of this language included the following provisions:

“The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.”<sup>2</sup>

This provision is similar to Article II of the 1967 Outer Space Treaty, which states that “Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” The purpose of this language was to prevent future wars over conflicting claims in space. The United States, Soviet Union (now Russia) and other nations have abided by this language. However, Article 11, Paragraph 2 of the Moon Treaty takes this language one step farther:

- **“Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person.”**<sup>3</sup> (Emphasis added.)

This language expressly prohibits private property, which is central to both the United States and the world’s international economies. Indeed, private property is one of the principal freedoms guaranteed by our nation’s Constitution. Without this protection, individuals also would lose the safety of their persons and political rights.

Like LOST (on which it was based), the Moon Treaty created an international body to control and distribute the resources of outer space:

- “States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.”<sup>4</sup>

This is, in fact, the same regime that the UN seeks to impose upon the resources of the unclaimed ocean seabed using the International Seabed Authority. The “international regime” of the Moon Treaty has the following purposes:

- (a) The orderly and safe development of the natural resources of the moon;
- (b) The rational management of those resources;
- (c) The expansion of opportunities in the use of those resources;
- (d) **An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the**

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<sup>1</sup> Moon Treaty, Article 11, Paragraph 1.

<sup>2</sup> Ibid, Paragraph 2.

<sup>3</sup> Moon Treaty, Paragraph 3.

<sup>4</sup> Moon Treaty, Article 11, Paragraph 5.

efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, **shall be given special consideration.**<sup>5</sup> (Emphasis added)

In short, the regime proposed by the Moon Treaty would result in a centralized, government-managed economy dedicated to distributing any benefits or profits from space resources to other nations not participating in that development or to UN members known to be hostile to U.S. interests. We would also note that the Soviet Union, despite being the premier socialist economy of the time, also did not sign the Moon Treaty, nor has the Russian Federation signed it in the years since the Soviet Union's collapse.

## **II. Specific Objections to Part XI of the LOST**

Despite the 1994 modifications, NSS reiterates its objections to the U.S. signing LOST for the following reasons:

### ***The International Seabed Authority (ISA) Creates a Centralized, Command Economy***

- LOST still treats the resources of the sea beds as the “common heritage of mankind.”<sup>6</sup> The “common heritage” clause equates to developing nations having a preponderant say, share, and veto power over the ability of United States citizens and companies to develop the resources of the seas or space.
- The international centralized economy of the International Seabed Authority (ISA) remains an inefficient and ineffective means of exploiting the world's unclaimed seabeds.
- Private individuals or companies are less likely to develop ocean or space resources if they know that an unelected, unaccountable international organization or a developing nation could seize their profits or technologies at its convenience.
- LOST, like its offspring the Moon Treaty, creates strong disincentives for private individuals to develop these new resources, however beneficial their eventual exploitation to humanity as a whole. By making the resources of the Earth or space as the common heritage of mankind, we ensure that there will be NO heritage.
- Nations that sponsor seabed mining companies are financially liable for damages caused by their citizens. This discourages development, as developed nations are often unwilling to pay for damages of this sort.
- “Pioneer” individuals or companies must provide two sites for development – one for the pioneer and one for the ISA to develop or hand over to a developing nation.
- The Treaty still favors state-run or state-sponsored enterprises rather than individual, private, or public corporations.

### ***The Treaty is Hostile to U.S. Interests***

- The U.S. already participates in the bulk of the LOST provisions, including international scientific research, maritime navigation, information sharing, environmental protection,

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<sup>5</sup> Ibid, Para. 7.

<sup>6</sup> Preface to the 1994 Annex of the Law of the Sea Treaty.

and technology transfer agreements, which are cited by LOST to protect the resources of the seas. Indeed, the U.S. has often taken the lead in these matters outside the Treaty.

- The United Nations International Seabed Authority (ISA) would have a membership that has a history of opposing U.S. policies and interests. Given ISA's rule by consensus, it is unlikely that the U.S. – which would pay for the bulk of ISA's operating costs – would get much benefit from submitting to it.
- Individuals supporting LOST argue that the U.S. will lose the ability to influence the decisions of the ISA if we do not sign the Treaty, and that by signing LOST, the U.S. will improve its prestige, credibility, and ability to affect international policies on the open seas. However, as noted above, the UN has become increasingly hostile to U.S. efforts on a variety of fronts. There is no guarantee that signing the Treaty will change this behavior. History suggests that we would be signing a treaty that would be in direct conflict with our national interests.
- While LOST does exempt military and sovereignty issues from its scope, the ISA could use its environmental mandates as a means of preventing free passage of U.S. military vessels. For example, New Zealand banned the passage of nuclear-armed or -powered vessels from its territorial waters.<sup>7</sup> As part of a signatory nation, the U.S. Navy's freedom of movement through the oceans could be greatly compromised.

### ***It Establishes Negative Precedents, Constraining Future U.S. Actions***

- Because the U.S. legal system is based upon common law, signing LOST establishes legal precedent for signing other similar measures, such as the Moon Treaty. Therefore, LOST directly threatens our ability to develop the resources of space.
- Brazil, China, India, Malaysia, North Korea, Pakistan, and others have signed LOST, but that has not prevented these countries from making ocean claims deemed excessive by others.
- By signing LOST, the U.S. sets an international expectation and precedent for signing the Moon Treaty, which it has rejected for 28 years. If we accept international control over the resources of Earth, the chances for developing the resources of space become remote.
- By submitting to international arbitration in matters regarding the seabed (or outer space), the U.S. establishes a precedent for submitting to the International Court of Justice (ICJ), which it has repeatedly refused to join.

## **IV. Recommended Alternatives to Signing the LOST**

It is the fervent hope of the NSS membership that the Senate will not ratify the LOST, but would continue to abide by all of its provisions except Part XI. Nevertheless, we offer the following alternative approaches should ratification become inevitable:

- Renegotiate the Treaty's language to substantially reduce the scope of ISA's power.

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<sup>7</sup> "Legal Challenges to Nuclear Weapons from Aotearoa/New Zealand." *Disarmament and Security Centre*. [http://www.disarmsecure.org/publications/papers/legal\\_challenges.html](http://www.disarmsecure.org/publications/papers/legal_challenges.html).

- Include interpretation language in the U.S. compliance stating that the provisions of the LOST shall not be applicable to the resources of outer space and that U.S. compliance with LOST does not equate to acceptance of the Moon Treaty.
- Add to the United States Code specific language allowing the exploitation of space resources.
- Propose a private-enterprise-driven treaty with our allies, spacefaring nations, and/or the UN as an alternative to the Moon Treaty.

### V. Summary

While it might appear incongruous for the National Space Society to be addressing a treaty regarding the world's oceans, we firmly believe that the precedents set by LOST pose a grave threat for the future well-being of the United States and the world.

- LOST imposes a socialist form of political economy on the resources of the unclaimed ocean. Such doctrines are hostile to private property, freedom, national sovereignty, and economic development. We believe that only private enterprise has the ability and will to develop these resources efficiently; however, that will to develop will be inhibited if U.S. companies are forced to accept UN control over their activities.
- LOST subjects U.S. interests on the seas to an international organization that has been historically hostile to those interests.
- LOST establishes a precedent for the United States to accept international authority over our future freedom of action on the seas.
- LOST establishes a precedent for the United States to sign the Moon Treaty and accept international authority over our future development of the resources of space.

LOST constrains U.S. actions, now and in the future, and it is the future with which NSS is most concerned. If our civilization is to continue growing and advancing, it will need the resources of space, an environment easier to work with, in many ways, than the bottom of the ocean floor. The Moon, asteroids, and comets offer more metals and useful materials than we could hope to use; and we have only tapped the smallest potential of solar power. The energy and metals from space offer an opportunity to reduce mining and pollution of our own world. In fact, asteroid mining could eliminate the need to exploit land- or ocean-based resources. And lastly, the techniques required to approach, divert, and mine comets and asteroids also can be employed to prevent similar objects striking the Earth itself, as happened in Tunguska in 1908 and in many other places of the world since then.

But none of this will happen if we accept the ugly precedents of LOST. Private individuals and private enterprise have proven the most effective agents for developing resources into products and materials needed by human beings. LOST would cause the resources of the sea, and eventually the resources of space, to become subject to nations hostile to private enterprise, which is the very engine of our freedom. For these reasons, the National Space Society strongly urges the United States Senate to reject the Law of the Sea Treaty.