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13 June 2011

The Honorable John F. Kerry
SR-218 Russell Office Building
Washington, D.C. 20510-2102

The Honorable Richard G. Lugar
SH-306 Hart Senate Office Building
Washington D.C. 2050-1401

Dear Senators Kerry and Lugar:

On behalf of the 57,000 members of the Reserve Officer Association (ROA), I am writing to express the Association's opposition to ratification of the Law of the Sea Treaty (LOST). ROA is chartered by Congress to advocate for national security, which would be impacted greatly if LOST was ratified.

ROA has taken a position independent of the Departments of Defense and State as stated in ROA's resolution 10-04: Non-ratification of the Law of the Sea Treaty (attached). The Law of the Sea Treaty is not needed to codify the international laws of the sea.

Resolution 10-4 has been in effect for the last eight years, having last been renewed at the 2010 National Convention. It states that "the treaty does not introduce any new protections for safe navigation on the high seas, but can introduce new risks that could impact the sovereignty over and the economy supported by the sea."

ROA has concerns that the Law of the Sea Treaty presents more risks than gains. LOST is too complex. It includes articles that impact the economy and the environment with the treaty covering seabed mining, navigation, fishing, ocean pollution, marine research, economic zones and in turn national security. Provisions in the treaty will even impact the sovereignty of the United States.

ROA disagrees with ratifying the treaty because it duplicates existing treaties, risks nullifying U.S. claims to areas of the continental shelf, places U.S. interests under the authority of international agencies, jeopardizes the safety of ships and crews, and weakens national security.

ROA does not oppose further codification sought by the naval services, but LOST is not the instrument. ROA supports the suggestion by Senator Kyl (R-Ariz.) that legislation could provide an alternative method to achieve codification. This would accomplish the goals of the Navy and the Coast Guard without subjecting the United States to the inherent risks written into the Law of the Sea Treaty.

CC to:

Sen. John A. Barrasso	Sen. Richard Durbin	Sen. James E. Risch
Sen. Barbara Boxer	Sen. James W. DeMint	Sen. Marco Rubio
Sen. Benjamin L. Cardin	Sen. James M. Inhofe	Sen. Jeanne Shaheen
Sen. Robert P. Casey	Sen. Johnny H. Isakson	Sen. Thomas S. Udall
Sen. Bob Corker	Sen. Michael S. Lee	Sen. James H. Webb
Sen. Christopher A. Coons	Sen. Robert Menendez	

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES
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The reasoning behind ROA position is explained by the following.

MAINTAINING FREE NAVIGATION

Prior to World War II, much of the interaction between nations about the oceans was governed by customary international law – a term used to describe practices determined by hundreds of years of historic routine recognized by most countries that made these practices legally binding.

The U.S. Navy claims that the treaty will benefit the United States by codifying customary international law. Yet, earlier treaties, ratified by the United States already provide protections that the Navy is seeking:

*** 12 nautical-mile limit to territorial seas;**

Congress first passed legislation in 1799 to allow the boarding of foreign flag vessels within 12 miles from the coast. Internationally the 12 nm contiguous zone limit was set by the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, which the U.S. ratified on April 12, 1961. By 1967, only 25 nations still used the old 3-mile limit.

Entry into Force: Sept 11, 1968.

*** Innocent passage through territorial seas;**

The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone codified Innocent passage in Section III stating: “*so long as it is not prejudicial to the peace, good order or security of the coastal state.*” The agreement was ratified by the U.S. on April 12, 1961. Entry into Force: September 11, 1968.

*** Ability to lay and maintain submarine cables for communication;**

The 1958 Geneva Convention of the High Seas provided under *Article 26* that : “*All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.*” The agreement was ratified by the U.S. on April 12, 1961. Entry into force on 30 September 1962.

*** Warship right-of-approach and visit;**

Were defined in the 1958 Geneva Convention of the High Seas.

Article 22: “1. ...a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That the ship is engaged in the slave trade; or

(c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. The agreement was ratified by the U.S. on April 12, 1961. Entry into force on 30 September 1962.

*** Sovereign immunity of warships and public vessels;**

Was also defined by the 1958 Geneva Convention of the High Seas.

Article 8: “Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag.”

Article 9: “Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag

State.” The agreement was ratified by the U.S. on April 12, 1961. Entry into force on 30 September 1962.

*** Transit passage in international straits and their approaches;**

An international strait was legally defined in 1949 by the International Court of Justice in the Corfu Channel case and transit passage was subsequently codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, as international navigation between any strait connecting two portions of the high seas. The U.S. ratified the 1958 accord on April 12, 1961.

*** High seas freedoms in exclusive economic zones (EEZs).**

Historically, the exclusive jurisdiction over marine resources beyond the territorial sea is credited to the United States of America in the Truman Proclamation of 28 September 1945 claiming sovereignty of the continental shelf and coastal fisheries. The Latin American declaration of Santo Domingo of 9 June 1972 is considered the precursor to the definition of exclusive economic zones at 200 miles. Since 1972, under the Magnuson Fishery Conservation and Management Act, the United States has exercised management and conservation authority over fisheries resources within 200 nautical miles of the coasts. In 1983, President Ronald Reagan confirmed U.S. sovereign rights and control over the living and non-living natural resources on, below or above seabed on the continental shelf.

The one exception to existing treaty protection is transit passage of archipelagic waters that is protected through other legal norms. The United States has always contended that such passage is covered by customary law, and continues to exercise its navigation rights by ships' movements of the Navy. LOST actually removes navigation freedoms, yielding authority to the International Maritime Organization as an agency that determines transit lanes.

*** Archipelagic sea lanes passage through island nations;**

In 1982, the U.N. Conference on the Law of the Sea (UNCLOS) recognized archipelagic states. Until an archipelagic state has completely designated its archipelagic sea lanes, vessels can exercise passage through all routes normally used for international navigation. But under LOST, once a complete archipelagic sea lane designation has been made, vessels are restricted to exercising the right of archipelagic sea lanes passage not traditional lanes, and can only conduct innocent passage through the remaining archipelagic waters not designated as archipelagic sea lanes.

LOSS OF U.S. TERRITORY

LOST goes far beyond navigation rules of the road, and as a broader convention includes articles that affect national security and control of the seabed on and beyond the continental shelf.

The Sea Law Convention created several institutions to carry out its provisions: the International Tribunal for the Law of the Sea to resolve border disputes, the Commission on the Limits of the Continental Shelf to determine maritime boundaries, and the International Sea Bed Authority to regulate mineral prospecting in the deep seabed.

The International Sea Bed Authority (ISBA), under the treaty has authority to control sea-bottom resources and levy application and annual fees, as well as collect a percentage of the profits on countries whose companies are “mining” the sea beds beyond the 200-mile exclusive economic zone (EEZ). Technology permits exploration out into the continental shelf beyond the 200-mile EEZ.

Under the Law of the Sea Treaty, the ISBA extends authority over continental shelf that extends beyond 200 miles. President Harry S. Truman first proclaimed sovereignty of the continental shelf and coastal

fisheries in 1945. The Law of the Sea Treaty has been called a "constitution" for the oceans. To ratify the treaty would acknowledge treaty superiority over U.S. sovereignty claims. If ratified it would supersede the U.S. Constitution, presidential executive orders, and existing U.S. Code.

WEAKENED NATIONAL SECURITY

The treaty will weaken national security. Under the treaty, participating nations have the right to decline vessel searches if those on board claim their sea travels are related to economic rather than military activity. Several such cases have already been brought before an international tribunal for host nations boarding of foreign vessels illegally fishing within EEZs.

The treaty also complicates the development of maritime security zones for homeland defense. Several nations have already challenged an Australian plan to establish a maritime defense zone out to 1000 kilometers.

The Navy states that exercising high seas freedoms in foreign EEZs includes conducting military exercises, but LOST actually restrict such freedoms. While submarines can continue to transit territorial waters submerged, under the treaty they must transit on the surface showing national colors to satisfy innocent passage. Also, while an aircraft carrier may launch and recover aircraft it may not do so while in innocent passage. These restrictions can negatively impact mission readiness while transiting foreign EEZs and archipelagic waters. LOST places U.S. crews in jeopardy as military operations can now be defined as hostile activities rather than innocent passage.

LOST Article 25 states, "*The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.*" Article 30 states that warships not complying with the laws of a coastal nation can be forced to leave. China interprets these articles to permit it to challenge within the 200 mile EEZ.

In 2001, a U.S. Navy EP-3 aircraft was operating about 70 miles away from the Peoples Republic of China's island province of Hainan, and about 100 miles away from the Chinese military installation in the Paracel Islands, when it was intercepted by two J-8 fighters. Following a collision with one of the jets, the EP-3 was forced to make an emergency landing on Hainan. In 2009, five Chinese vessels reportedly shadowed and maneuvered aggressively in dangerously proximity to *USNS Impeccable*, an ocean surveillance ship. This was less than 75 miles from Hainan Island. The Chinese protested that *the Impeccable* was on a spy mission, violating international law by conducting illegal survey activities too close to its coastline.

Articles 19 & 20 of the treaty would proscribe the U.S. Navy from training with weapons, collecting intelligence or interfering with enemy communications in the territorial waters of other states without their expressed permission, validating China's position.

BOUNDARY EXPANSION

While lawmakers, such as Sen. John McCain (R-Ariz.), among others, support the treaty, claiming that it could be used to counter an increasingly aggressive Chinese military in areas like the South China Sea, ROA is concerned that countries will use the Law of the Sea Treaty as justification for territorial claims and expansion. A land (island) rush could result as a means to extend sovereign boundaries.

The rush has already started, with China reasserting historical claims over all the islets, including the Paracel and Spratly archipelagos, and 80 percent of the South China Sea. Sand cays, reefs and rocks that often lie below tidal waters are recognized as land under the treaty and are being built up and manned by

Chinese military to bolster territorial claims. A prime example is Mischief Reef, which is within the waters claimed by the Philippines, where China has built permanent, multistory structures on concrete platforms above the reef. By connecting the dots China will be emboldened to extend its territorial claim based on the Law of the Sea Treaty and a loose interpretation of the Exclusive Economic Zone to much of the South China Sea.

The Republic of the Philippines also claims the Spratly islands based on proximity, as many of the islands are within the 200 mile Exclusive Economic Zone of the Philippines. China counters the Philippine's claim to the Spratlys by noting that LOST does not mention "proximity" mentioned in the LOST. As this example illustrates, nations aren't necessarily going to abide by the LOST provisions the way the U.S. interprets them.

RESTRICTIVE DISPUTE RESOLUTION

The treaty also mandates dispute resolution between treaty signers. These would be compulsory procedures. Should a dispute arise, the parties can present their case before a conciliation commission whose report will be non-binding. A state may also choose one of the following means of dispute settlement: the International Tribunal for the Law of the Sea; the International Court of Justice (ICJ); an arbitral tribunal; or a special arbitral tribunal for one or more of the dispute categories specified in the treaty. The legal complexity is worrisome.

While military officers who served as members on the U.S. delegation that negotiated the convention on the law of the sea contend that military activities are exempt from mandatory dispute resolution, this is not necessarily ironclad. The "opt out" clause in Article 298 neither mentions nor defines military or intelligence operations. If there is a disagreement over what is or is not a military activity, LOST requires the matter to be resolved by an international agency.

The Navy has suggested that the president and the Senate can reject the International Court of Justice and the International Tribunal Law of the Sea, but instead choose arbitration. But, if the parties in dispute cannot agree on the arbitration panel, the U.N. Secretary-General will choose the arbitrators who may not be sympathetic to the United States.

SEAT AT THE TABLE?

It is being argued that while we abide by the treaty we lose leverage by not being a party to the treaty. Secretary of State Clinton expressed at a recent hearing that "becoming a treaty member would give the U.S. another tool with which to engage other nations, especially given a race for maritime energy resources, such as in the Arctic region."

Dr. Peter Leitner of George Mason University and author of *Reforming the Law of the Sea Treaty* disagrees. Dr. Leitner said that, "the current slogan being echoed by treaty supporters that we need to have a seat at the table to influence developments. Somehow supporters ignore the math of one seat among approximate 150 seats, the power of the one-nation/one-vote principle and the overwhelming anti-American agenda of at least 120 of the 150 seats that we are going to be sitting with."

The math works against the United States, which is one more reason for ROA to advocate against ratification of the theory. The United States does not even need a seat at the table with the U.S. having resolved contentious maritime disputes with other nations regularly and peacefully throughout its maritime history without being a member at the LOST table.

The U.S. has negotiated near collision disputes with the Soviet Union using the 1972 International Regulations for Preventing Collisions at Sea. In 1989, the two nations signed the Uniform Interpretation of Rules of International Law Governing Innocent Passage defining U.S. access to Soviet waters.

After advocating for special recognition for archipelagic states during the 1982 United Nations Law of the Sea Convention (LOSC), Indonesia was the first to restrict ocean transit under the provisions of LOST. In 2005, Indonesia was the first and, to date, only archipelagic state to seek to designate archipelagic sea lanes, with only three North/South transit lanes. No East/West lanes were suggested. The United States and Australia negotiated with Indonesia to add additional archipelagic sea lanes.

CONCLUSION:

In conclusion, ROA does not endorse ratification of the Law of the Sea Treaty and actively advocates against it. Historically the United States has claimed that its right to territory was manifest. To agree to the Law of the Sea Treaty acknowledges that the United Nations has authority over the United States on maritime territorial claims.

ROA's concern is that the Law of the Sea Treaty will become a political document that will be promoted in legal terms. By signing the treaty, U.S. maritime leverage will diminish, because unlike the U.S. seat in United Nations, LOST does not provide a security council to balance the decisions of the body.

Open public debate on this issue is paramount. The Reserve Officer Association is willing to discuss our positions with any member of the Senate or their office. Please contact CAPT. Marshall Hanson, USNR (ret.), ROA's Naval Service Director, with any concerns or questions. He can be reached at 202-646-7713 or mhanson@roa.org.

Sincerely,

A handwritten signature in black ink that reads "Andrew B. Davis". The signature is written in a cursive, flowing style.

Andrew B. Davis
National Executive Director
Reserve Officers Association

**Non-ratification of the Law of the Sea Treaty
Resolution No. 10-04**

WHEREAS, there are valuable provisions in the Law of the Sea Treaty, there are also many provisions that cause concern; it is not enough to highlight the benefits of the treaty without weighing the commitments that would be the price for full American participation in this system;

WHEREAS, the Law of the Sea Treaty is a broad agreement including articles that affect the economy and the environment with the treaty covering seabed mining, navigation, fishing, ocean pollution, marine research, economic zones and in turn national security; and

WHEREAS, a fundamental premise of the treaty is that all un-owned resources on the ocean's floor belong to the people of the world, and the treaty creates levels of paid bureaucracy and an International Seabed Authority (ISA) to control these resources; and

WHEREAS, the ISA will regulate deep seabed mining and redistribute income from the industrialized West to developing countries through arbitrary, excessive application fees, annual fees and royalties; costs of access to raw materials are likely to inhibit development, depress productivity, increase costs, and discourage innovation; and

WHEREAS, many activists view the treaty as a far reaching environmental accord; setting a global standard and providing enforcement mechanisms so that all countries are legally bound to protect the marine environment, protect fish stocks and prevent pollution; and

WHEREAS, ratification of the treaty may subject US Naval forces, and will subject U.S. maritime and coastal industry to international tribunal or arbitration during disputes predicated on the treaty as geopolitics differs from law; and

WHEREAS, the treaty does not introduce any new protections for safe navigation on the high seas, but can introduce new risks that could impact the sovereignty over and the economy supported by the sea; and

WHEREAS, the Constitution of the United States provides in Article VI that "All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land" ratification may lead to international jurisdiction over U.S. interests;

NOW, THEREFORE, BE IT RESOLVED, that the Reserve Officers Association of the United States, chartered by Congress, urges the United States Senate, to deny ratification of the Law of the Sea Treaty.

Renewed by the ROA National Convention, 10 February 2010
Adopted by the ROA National Council, 13 February 2008
Source: ROA Department of Texas, Dec. 2007