Cato Institute Foreign Policy Briefing No. 29: Do Not Endorse the Law of the Sea Treaty

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Executive Summary

The Clinton administration is showing new interest in the Law of the Sea Treaty, which the United States rejected in 1982 when it was approved at the United Nations. The LOST gives the United Nations vast control over the use and exploitation of the seas' resources. Although in November 1993 the treaty gained the number of ratifications needed to take effect on November 16, 1994, the United States should still refrain from signing on.

The LOST establishes rules for such matters as resource jurisdiction, navigation, and seabed mining. Although proponents of the treaty say that an internationally recognized system of rules is important, commerce and transportation have proceeded unhampered without the treaty, and other mechanisms exist for resolving international disputes. Moreover, the treaty's objectionable provisions on seabed mining, if they become effective, will harm both the West and the developing world. The LOST's mandates will increase costs and depress productivity.

It is senseless to embrace a treaty that embodies the most odious features of centralized planning. The United States should continue to reject the LOST and promote a market-oriented system that would truly benefit both the developed and the developing world.

Introduction

More than two decades of negotiations culminated in 1982 when the Third United Nations Conference on the Law of the Sea (UNCLOS) approved the Law of the Sea Treaty. The LOST, as the convention is known, was heralded as providing "a constitution of the oceans" governing everything from ocean transit to maritime research to seabed mining. However, the United States was not among the 117 nations (and 2 other delegations) that penned their approval of the treaty, opened for signature amidst great fanfare on December 10, 1982. Indeed, Washington's steadfast opposition long prevented the LOST from gaining the 60 ratifications necessary for the treaty to take effect. Even the Soviet Union, which had proudly proclaimed its solidarity with the developing nations pushing the convention, did not formally bind itself.

Moreover, as mineral prices declined, so too did the prospects of massive mineral harvests from the seabed. Third World states that had begun planning how to spend the windfall they expected to collect through the United Nations began to face reality. And as developing countries started experimenting with market economics, they backed away from the collectivist New International Economic Order (NIEO), of which the LOST had been an integral part. By the early 1990s some Third World diplomats were privately admitting to U.S. officials that the Reagan administration had been right to reject the treaty.[1]

But now the Clinton administration wants to "fix" the LOST. Administration diplomats spent several days in early August at the United Nations conferring with representatives of other nations about the possibility of renegotiating the

treaty.[2] Although the administration has not been specific about how it would change the treaty, it has insisted that the United States would benefit from ratifying a revised LOST because America would then be able to influence the composition and implementation of the agreement, bolster U.S. leadership, and support a framework of rules that all nations would follow. After all, according to one administration official, "It is obviously better for there to be more agreement than less."[3]

Even more enthusiastic is the newly elected Canadian government, which denounced its predecessor for following Washington's lead in staying aloof from the treaty.[4] And long-time supporters of UNCLOS have been urging the United States to hurry. As the LOST neared ratification, complained Aaron Danzig, former chairman of the World Peace through Law Center's Law of the Sea Committee: "The United States could end up refusing to sign a treaty that other countries have adopted and its own delegation toiled over long and valiantly. It would be a pity to neglect this window of opportunity."[5]

What Is the LOST?

The genesis of the treaty was President Harry S Truman's 1945 proclamation asserting U.S. jurisdiction over America's continental shelf, and similar extensions of national control by other states. Those developments brought the issue of the use and management of ocean resources to the forefront of international affairs. The first UNCLOS was opened in 1958; it drafted agreements dealing with jurisdiction over resources and fishing. UNCLOS II convened in 1960 to take up unresolved fishing and navigation issues. Soon thereafter the possibility of seabed mining led the United Nations to declare the seabed the "common heritage of mankind." The Seabed Committee was established, eventually leading to UNCLOS III, which first met in 1973. Nine years and eleven sessions later, a treaty was born.

The LOST, which runs 175 pages and contains 439 articles, covers seabed mining, navigation, fishing, ocean pollution, marine research, and economic zones. Much of the treaty is unobjectionable, or at least unimportant when in error; the navigation sections are even a modest plus. But not so Part 11, which contains the Orwellian provisions governing seabed mining.

The LOST's fundamental premise is that all unowned resources on or below the ocean's floor belong to the people of the world, meaning the United Nations. The United Nations will assert its control through an international seabed authority, ruled by an assembly (dominated by poorer nations) and a council (with three seats theoretically going to the former Soviet bloc),[6] which will regulate deep seabed mining and redistribute income from the industrialized West to developing countries. The Authority's chief subsidiary, the Enterprise, will mine the seabed, with the coerced assistance of Western mining concerns, on behalf of the Authority.

Any international regulatory system would probably inhibit development, depress productivity, increase costs, and discourage innovation, thereby wasting much of the benefit to be gained from mining the oceans. But the Byzan tine regime created by the LOST is almost unique in its perversity. Even former Maltan UN ambassador Arvid Pardo, who coined the phrase "common heritage of mankind," ended up calling the system "fatally flawed" and complaining that it could "prove to be an enduring economic burden on the international community."[7]

For instance, the treaty is explicitly intended to restrict, not promote, mineral development. Among the treaty's objectives are "rational management," "just and stable prices," "orderly and safe development," and "the protection of developing countries from the adverse effects" of mineral production. The LOST formally limits mineral production and authorizes commodity agreements (rather like the Organization of Petroleum Exporting Countries). Further, the treaty places a moratorium on the mining of other resources, such as sulfides, until the Authority adopts rules and regulations--which could be never.

The provisions governing mining also reflect an anti-production bias. A firm must survey two sites and turn one over gratis to the Enterprise even before applying for a permit, in competition with the favored Enterprise and developing states. The Authority can deny an application if the firm's proposed project would violate the treaty's anti-density and anti-monopoly provisions, aimed at U.S. operators. And the Authority's decisions will be made by the Legal and Technical Commission, the membership of which could be stacked, and the 36-member Council, which will be dominated by developing states, making American firms' access dependent on the whims of countries that might oppose seabed mining for economic or political reasons.

Who Would Want to Bid?

Indeed, it is not clear that a firm would want to bid even if it thought it could win approval. The convention requires that private entrepreneurs transfer their mining technology to the Authority, for use by the Enterprise and developing states. The term "technology" is so ill-defined that the Authority might be able to claim engineering and technical skills as well as equipment, yet the treaty imposes no effective penalties for improper disclosure or misuse of transferred technology. Miners will also have to pay their overseer, the Authority, and competitor, the Enterprise: $500,000 to apply, $1 million annually, plus a royalty fee. The sponsoring country will be responsible if a firm fails to pay; moreover, the industrialized West will have to provide interest-free loans and loan guarantees, for which Western taxpayers will be liable in the event of a default, to the UN mining operation.

All told, the Enterprise will enjoy free mine-site surveys, transferred technology, and Western subsidies. The Enterprise, naturally, will be exempt from Authority taxes and royalty payments. Also favored are developing states, estimated to be more than 150 today, including at least 105 "land-locked and geographically disadvantaged" countries.

Even private firms' attenuated right to mine the seabed may be dropped at the Review Conference to be held to assess the LOST 15 years after the commencement of commercial operations, if three-fourths of the member states so decide. With the end of the Cold War, such an event may seem unlikely, but world politics can veer wildly, especially in more obscure forums such as a quasi UNCLOS. In any case, the mere possibility of Third World states' effectively confiscating potentially enormous investments made over more than a decade would discourage all but the most daring private entrepreneurs undertaking projects with quick payoffs. That caution, in turn, would give the pampered Enterprise and the, probably subsidized, firms of developing states a further advantage.

Admittedly, the promise of seabed mining is far less bright today than it was when UNCLOS convened, but operations may still become economically feasible by early in the next century, especially as technological innovation makes mining less expensive. In any case, even if no manganese nodules or other mineral deposits are likely ever to be lifted commercially from the ocean's floor, the LOST remains unacceptable because of its coercive, collectivist philosophical underpinnings.

The New International Economic Order

UNCLOS III was held in a different era, a time when communism reigned throughout much of the world, Third World states were proclaiming that socialism offered the true path to progress and prosperity, and international organizations were promoting the NIEO to engineer massive wealth redistribution from the industrialized to the underdeveloped states. Indeed, much of the LOST, particularly the provisions on seabed mining, was dictated by the so-called Group of 77, the developing states' lobby in the United Nations.

Those nations saw the LOST as the leading edge of a campaign that included treaties covering Antarctica and outer space, expanded bilateral and multilateral aid programs, and a veritable gallery of UN alphabet-soup agencies--CTC, ILO, UNCTAD, WHO, and WIPO.[8] When Pardo was more enthusiastic about the LOST, he commented that American acceptance of the sea treaty, even if qualified and reluctant, would validate the global democratic approach to decisionmaking.

Luckily, economic reality has since hit many poorer states. Even kleptocratic quasi democracies such as Mexico, authoritarian collectivist regimes such as Tanzania, and formally communist states such as Vietnam have begun to adopt market reforms. The growing realization that open markets bring growth helped sap support for the NIEO--particularly the closed seabed system, which would deny industrialized and industrializing nations alike access to new resources, markets, and technologies. In fact, Third World states finally seemed to realize that shutting the ocean frontier would most hurt the poorest countries, since they most need new economic opportunities. By the late 1980s the NIEO had disappeared from international discourse, along with any mention of the LOST.

Although American ratification of the LOST would not be enough to resurrect the NIEO, it would nevertheless enshrine in international law some very ugly precedents. One is that the nation states, not the peoples, of the world would collectively own "all the unclaimed wealth of this earth," in the words of Malaysian prime minister Mahathir

Min Mohamad.[9] Granting ownership and control to petty autocracies with no relationship to the resource or ability to contribute anything to its development makes neither moral nor practical sense. Much better on both counts is the concept put forth by John Locke: that mixing one's labor with resources--by developing complex machinery capable of scouring the ocean floor, for instance--grants one a property interest in them.[10]

Locke's prescription would also better suit the interests of the people of the developing world. The LOST may purport to promote international justice, fairness, and cooperation, but in fact it advances none of those principles. Rather, it raises to the status of international law self-indulgent claims of ownership to be secured through an oligarchy of international bureaucrats, diplomats, and lawyers. And the treaty's specific provisions, mandating global redistribution of resources, creating a monopolistic public mining entity, restricting competition, and requiring the transfer of technology, reflect the sort of statist panaceas that were discredited by the demise of Soviet-style communism.

Countervailing Benefits?

Some observers acknowledge the treaty's failings but nevertheless contend that it has more than enough positive benefits to warrant U.S. approval. Typical is the argument by three members of the Center for Law and Social Policy: "Although the draft is not perfect, we believe that the benefits to U.S. interests from the treaty far outweigh the disadvantages."[11]

Many of the nonseabed provisions are, indeed, marginally beneficial, but a number are somewhat harmful. Sections governing fishing and maritime research, for instance, make few changes in current law; the boundary-setting process strips some resources from the United States; the pollution provisions restrict America's ability to control some emission sources; and the United States might eventually have to share oil revenues from development of the outer continental shelf. The treaty's authorization of 200-mile exclusive economic zones (EEZs) merely reflects what has become customary international law.

Perceived as far more important are the navigation provisions. For instance, Rear Adm. William Schachte, Jr., a Pentagon official who backed the LOST during the Reagan years, argues that the document is vital to guarantee American naval rights. Yet Washington's refusal to sign the LOST left critics predicting chaos and combat on the high seas a decade ago; since then we have not witnessed a single incident that was a result of the failure to implement the LOST.

Nor is the treaty completely favorable to transit rights. The document actually introduces some new limitations on navigation in the EEZs, territorial seas, and water surrounding archipelagic states. At times, the LOST's language is ambiguous--regarding transit rights for submerged submarines, for instance--which limits the value of the treaty guarantee. Even Pardo complains that the treaty "is often studiously unclear, and predictability suffers."[12] In short, the LOST would give only modest theoretical advantages to transit, and the mining provisions would exact an extremely high price for them.

In any case, the LOST's legal protections offer little practical advantage. Few nations are likely to interfere with commercial shipping, because they have far more to gain economically from allowing unrestricted passage. When countries perceive their vital national interests to be at stake--Great Britain in World War I and Iran and Iraq during their war throughout the 1980s--they are not likely to allow juridical niceties to stop them from interdicting or destroying international commerce.

As for military transit, America need only concentrate on maintaining good relations with the nations that dominate the handful of truly strategic waterways, as few as three-- the Straits of Gibraltar and two Indonesian passages--according to Robert Osgood of the Johns Hopkins School of Advanced International Studies.[13] And the prowess of the U.S. Navy, not the LOST, will remain the ultimate guarantor of America's ability to roam the seas. Of course, Washington would prefer not "to have to use muscle to exercise our rights," as former LOST negotiator Elliot Richardson observed.[14] But the treaty is likely to matter only where countries have neither the incentive nor the ability to interfere with U.S. shipping. Admiral Schachte contends, "If you look at the Persian Gulf situation, for example, we didn't have problems with Iran or Oman in using the Strait of Hormuz, because they recognized that the language of the treaty was clear."[15] Yet Iran, which attacked Kuwaiti oil tankers during its war with Iraq, is hardly the sort of nation to be deterred by an international treaty, however clear its language. If Iran, or any other coastal state, believes

it to be in its vital interest to prevent the passage of U.S. ships, then its signature on an omnibus treaty will not be likely to prevent it from acting; rather, the country will be concerned primarily about America's willingness to force passage.[16] Since the USSR has disappeared, the Red Navy is rusting in port, and Third World conflicts no longer threaten America through their connections to the Cold War, Washington is rarely going to have to send its fleet where it is not wanted.

Collectivism or Chaos: False Alternatives

The final argument for the LOST is that no matter how unfavorable it may be for international mining, it is better than nothing. Opined Bernard Oxman of the University of Miami Law School, the LOST is "for some time to come the only basis for achieving a body of rules for using the sea whose legitimacy is globally recognized. In that sense, the choice is between imperfect law and no law."[17] Unless their claim to deep-sea mining sites is somewhat secure, it is said, companies will not invest the millions necessary to begin operations. Especially now, proponents of the LOST argue, firms will not take the potentially enormous risks of such new ventures if they might face conflicting claims under a UN treaty even if the United States established a competing regulatory system.

However, Richardson was right when he argued 15 years ago that "seabed mining can and will go forward with or without a treaty."[18] Most business leaders interested in seabed mining understand that it makes little difference whether or not, say, Zaire recognizes their right to harvest manganese nodules in the Pacific. Indeed, given the dynamics of seabed mining, it probably does not even matter if other industrialized nations, with firms capable of mining the ocean floor, recognize one's claim. The seabed's irregular terrain and surplus of nodules make "poaching" uneconomical--it would make more sense to develop a new site than to attempt to overrun someone else's.

In any case, it would be quite simple to come up with an alternative to the LOST. In 1980 the United States passed unilateral legislation, the Deep Seabed Hard Minerals Act, to provide interim protection for American miners until implementation of the LOST. The act could simply be amended to create a permanent process for recording seabed claims and resolving conflicts. Such legislation could then be coordinated with that of the other leading industrialized states. In September 1982 Britain, France, Germany, and the United States signed the Reciprocating States Agreement to provide for arbitration of competing claims. Such an informal system could be upgraded into a formal treaty, authorizing each nation to oversee its own companies' activities and creating a mechanism for resolving any conflicts.[19] No international bureaucracy would be necessary.

Such a system can exist alongside the LOST. The treaty cannot bind nations that have declined to ratify it, although its existence may discourage other countries from joining the United States in an alternative regime. However, the fact that profitable seabed mining is not viable under the UN Authority increases the likelihood that the United States could establish a workable, market-oriented system.

In any case, an unchallenged bad treaty is worse than potentially conflicting treaties. Back when the LOST was a major political issue, the American Mining Congress observed:

While the best of all worlds would be a comprehensive, universally acceptable treaty, a treaty such as the current UNCLOS draft that fails to protect American interests is no basis for investment. We can easily do without the "comprehensive" and "universal," but we cannot do without "acceptable."[20]

A Window That Should Remain Closed

Danzig worries that the United States might neglect the current "window of opportunity," but it is a window that should remain firmly shut. International treaties attract State Department negotiators like lights attract moths, but substance, not symbolism, should guide U.S. policy on the LOST. Unfortunately, it is a bad agreement, one that cannot be improved without abandoning its philosophical presupposition that the seabed is the common heritage of the world's politicians and their agents, the Authority and the Enterprise.

But the United States is unlikely to win such a change. Foreign negotiators will almost certainly offer no more than cosmetic concessions. If Washington then ratifies the accord, the biggest losers from limiting access to the ocean's vast potential will not be Western businesses, consumers, and taxpayers, though they all would suffer. Instead, those most

hurt will be the peoples of the Third World who desperately need economic development. Ignoring rather than endorsing the LOST, and implementing a market-oriented system in its stead, would, in contrast, promote the liberal international economic order upon which the future of all the world's peoples depends.

Notes

[1] Bush administration officials at the United Nations reported on these conversations as part of their informal discussions with opponents of the treaty about whether Washington should attempt to renegotiate the accord. The proposal received little support and was never pursued.

[2] David E. Pitt, "U.S. Seeks to 'Fix' Mining Provisions of Sea Treaty," New York Times, August 28, 1993, p. A3. Almost from the moment that the United States declined to sign the accord, proponents of LOST began urging Washington to use all "opportunities to improve the treaty's controversial seabed mining provisions." Letter from Elliot L. Richardson, chairman of Citizens for Ocean Law, to George Shultz, secretary of state, December 15, 1982 (copy in author's files).

[3] David A. Colson, deputy assistant secretary of state for oceans and fisheries affairs, Paper presented at the Center for Oceans, Law and Policy, Washington, March 19, 1993, p. 6.

[4] John Urquhart, "Canada Election Won by Liberals Led by Chretien," Wall Street Journal, October 26, 1993, p. A17.

[5] Aaron Danzig, "Let's Go Full Speed Ahead on Law of the Sea," Letter to the editor, New York Times, September 18, 1993, p. 18.

[6] In the name of an "equitable geographic distribution of seats in the Council," Article 161 of the treaty guarantees the "Eastern European (Socialist) region" representation in each of three different categories: mineral consumers, mining investors, and global regions. Presumably the demise of the communist states so empowered makes those clauses inoperative, although it is possible that the successor nations that have emerged from the wreckage of the Soviet empire might lay claim to those seats.

[7] Arvid Pardo, "An Opportunity Lost," in Law of the Sea: U.S. Policy Dilemma, ed. Bernard H. Oxman et al. (San Fran cisco: ICS Press, 1983), p. 23.

[8] For more information on the NIEO, see Doug Bandow, "Totalitarian Global Management: The UN's War on the Liberal International Economic Order," Cato Institute Policy Analysis no. 61, October 24, 1985.

[9] Mahathir Min Mohamad, Statement to the UN General Assembly, 1982.

[10] See, for example, Robert A. Goldwin, "Locke and the Law of the Sea," Commentary, June 1981, pp. 46-50.

[11] Letter from Clifton E. Curtis et al., Center for Law and Social Policy, to James L. Malone, assistant secretary of state for oceans and international environmental and scientific affairs, July 30, 1981 (copy in author's files).

[12] Pardo, p. 17.

[13] Robert E. Osgood, "U.S. Security Interests and the Law of the Sea," in The Law of the Sea: U.S. Interests and Alternatives, ed. Ryan C. Amacher and Richard James Sweeney (Washington: American Enterprise Institute, 1976), pp. 14-15.

[14] Quoted in Pitt.

[15] Quoted in Pitt.

[16] Osgood gives a number of examples of nations that have ignored clear international law regarding naval operations. See The Law of the Sea: U.S. Interests and Alternatives, pp. 29-30.

[17] Bernard H. Oxman, "The New Law of the Sea," American Bar Association Journal, February 1983, p. 162.

[18] Quoted in William Hawkins, "Reaffirming Freedom of the Seas," The Freeman, March 1982, p. 185.

[19] For a more detailed look at market-oriented options, see Doug Bandow, "Developing the Mineral Resources of the Sea bed," Cato Journal 2, no. 3 (Winter 1982): 793-821.

[20] American Mining Congress, "Undersea Mineral Resources," photocopy, September 27, 1981.