Cato Institute Foreign Policy Briefing No. 32: Faulty Repairs: The Law of the Sea Treaty is Still Unacceptable

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Executive Summary

The Clinton administration has signed a renegotiated version of the United Nations Law of the Sea Treaty, which has been submitted to the U.S. Senate for ratification. State Department officials claim that the revised treaty eliminates objectionable provisions pertaining to deep seabed mining, builds on a market-oriented approach to exploiting ocean resources, and supports American interests.

Although U.S. officials have won some modest improvements, the treaty still hinders seabed development and remains inimical to American interests. The convention would set up a burdensome UN bureaucracy to administer the oceans. The system would still force private firms to share their profits with, and provide free mine sites to, the new UN agency. The treaty would continue to apply anti-density and anti-monopoly provisions disproportionately to U.S. mining companies and might still allow the imposition of production limits. Last, the revised language, while not explicitly mandating technology transfers, remains a potential time bomb.

The Senate should reject the treaty and encourage interested countries to expand the decentralized, relatively informal arrangement that currently governs seabed mining and has served the international community well.

Introduction

In Washington bad ideas never die. They simply lie dormant, waiting for a sympathetic bureaucrat or politician to revive them. So it has been with the Law of the Sea Treaty, which covers everything from navigation to seabed mining. Although rejected by President Ronald Reagan more than a decade ago, the LOST, as it is called, has returned to life under the Clinton administration. After winning a few changes in the treaty's most burdensome provisions, the State Department has now enthusiastically endorsed the agreement. On July 27, 1994, before the UN General Assembly, U.S. ambassador Madeleine Albright praised the LOST for providing "for the application of free market principles to the development of the deep seabed" and establishing "a lean institution that is both flexible and efficient."[1] Two days later Albright formally affixed her signature to the convention, which now goes to the Senate for ratification.

Although the revised LOST is not as bad as its predecessor, it would still create a Rube Goldberg system--with the International Seabed Authority (ISA), the Enterprise, the Council, the Assembly, and more--that would be guaranteed to become yet another multilateral boondoggle. It would not only waste money but also discourage the production of ocean minerals. Moreover, the treaty would resurrect the redistributionist lobbying campaign once conducted by developing states unwilling to deal with the real causes of their economic failures. Indeed, the LOST would essentially

create another UN agency with the purpose of transferring wealth from industrialized states to the Third World voting majority.

Throughout the 1970s and early 1980s, most Third World states saw socialism as the wave of the future. At home they implemented centrally planned development strategies. Abroad they promoted what they euphemistically called the New International Economic Order--global management and redistribution of resources, technology, trade, and wealth. Their UN lobbying arm, the so-called Group of 77, pressed for technology transfers, corporate codes, controls on transborder data flows, restrictions on investment, limits on intellectual property rights, international taxation, commercial preferences, additional foreign aid, and domination of unowned natural resources. Virtually no international organization was untouched by that campaign: such alphabet-soup agencies as the United Nations Industrial Development Organization (UNIDO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Transnational Corporations (CTC), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations itself became international battlegrounds.[2]

No fight was more important than that over the LOST. The treaty promised to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries."[3] It took a decade to negotiate and ended up containing more than 400 articles on subjects ranging from ocean transit to marine pollution to territorial seas. But its most hotly contended provisions addressed a then nonexistent industry: seabed mining.

The Common Heritage of Mankind

The ocean floor is littered with manganese nodules and deposits of other resources, such as cobalt, coral, oil, and polymetallic sulfides.[4] The prospect of recovering what was believed to be virtually untold wealth began to gain attention in the 1960s; in 1967 Malta's UN representative, Arvid Pardo, proposed that the seabed be declared the "common heritage of mankind."[5] The UN General Assembly adopted Pardo's rhetoric, established the ad hoc Seabed Committee, and proposed creation of a system to ensure "equitable sharing by States in the benefits derived" from the seabed.[6] In 1973 the United Nations organized the Third United Nations Conference on the Law of the Sea (the first two had focused on ocean jurisdiction and fishing). Eleven sessions later, on April 30, 1982, UNCLOS III brought forth a treaty that theoretically guaranteed the ocean's resources as the common heritage of mankind.

The convention went on to create the ISA and the Enterprise, to mine the ocean floor for the ISA. The ISA was to be ruled by the Assembly and the Council; the Soviet bloc was to be guaranteed three seats on the latter while the United States was assured of none. Western countries and firms were to provide funds and technology to the ISA for redistribution to developing states. The treaty limited production, failed to guarantee private firms nondiscriminatory access to the seabed, subsidized the Enterprise, and otherwise promoted economic war on the industrialized states.[7] That monumental boondoggle was admittedly bipartisan in the making: Henry Kissinger, Elliot Richardson, Jimmy Carter, and Alexander Haig all supported it. But President Ronald Reagan did not, and he was soon to be followed by the leaders of other major developed states and even the Soviet Union in rejecting the accord. Proponents of the LOST warned that chaos and doom were sure to result. The world went on as before, however, and the agreement sank beneath the waves.

But diplomats are attracted to treaties like moths to lights. Informal discussions began in 1990 over the possibility of the United States' adhering to a revised agreement and culminated in the president's recent decision to sign the LOST and submit it to the Senate for ratification. Stated Secretary of State Warren Christopher, "It's an extremely important treaty, and I think it's very desirable that we have been able to obtain from the other members satisfactory amendments to the seabed mining provisions that enable us to approve the treaty as a whole."[8]

A Treaty in Search of a Problem

The basic question, which the secretary did not answer, is, why the LOST? Earlier this year David A. Colson, deputy assistant secretary of state for oceans, admitted that "the basic flaws of that deep seabed mining regime are manifold."[9] But the administration obviously assumed that the United States should sign, so it directed chief negotiator Wesley Scholz and his colleagues to "fix" the treaty. Is there any reason to join, however? Haggling over

which of the accord's tentacles are most dangerous and therefore should be severed seems to have obscured the fact that the whole octapus should be killed.

Some advocates of the LOST have argued that a universal accord would promote seabed mining. A truly market-oriented accord might do so; not, however, a system that includes the ISA, the Enterprise, the Council, revenue sharing, international royalties, Western subsidies for the Enterprise, a Council veto for land-based minerals producers, and the like. Yet all of those anti-development provisions remain in the revised text.

That the treaty would favor political over productive activity should come as no surprise. The LOST was created in a different era. It was intended to inaugurate large and sustained wealth transfers from the industrialized states. The structure was therefore crafted to advance ideological, not economic, goals. Since then, however, most developing states have moved away from collectivism, and the promise of undersea mining has largely evaporated. Yet the original collectivist framework remains. Even the State Department acknowledges that the new "agreement retains the institutional outlines of Part XI," which contains the seabed mining provisions.[10] The treaty has become a solution in search of a problem.

A good international treaty would be useful, but it is not necessary. True, Elliot Richardson, who led the American delegation during the Carter administration, claims that the United Nations' mere assertion that the ocean's resources are the "common heritage of mankind" has abrogated any right to mine the seabed without that body's approval. He warns that "if any mining defied international law, its output would be subject to confiscation as contraband."[11] Ambassador Richardson does not explain who would do the seizing--a UN navy? More important, until Washington and its industrialized allies ratify the LOST, their nationals retain the liberty to mine the seabed.[12] In fact, that makes it all the more important that the United States refuse to ratify the accord. Once Washington has done so, a future renunciation of the LOST might not be considered enough to reestablish Americans' traditional freedom on the high seas.

Still, treaty supporters point out, the LOST, having gained more than the necessary 60 ratifications from UN member nations, will go into effect in November 1994 irrespective of Washington's ratification decision. However, nations cannot be held to surrender their rights because other states have ratified a treaty. Put bluntly, it matters little whether or not Djibouti, Fiji, or Zambia approves of American mining consortia operating in the Pacific. An ISA without any industrialized states as members would be about as effective as the "international regime" that is supposed to be established under the UN Moon Treaty, which--I am not making this up, to quote humorist Dave Barry--formally took effect 10 years ago in July.[13]

A decentralized and relatively informal system, perhaps with a small international office, that provided for mutual recognition of mine sites and arbitration of conflicts would offer adequate security of tenure for mining companies. In fact, the United States and the Europeans implemented that type of strategy when they rejected the LOST.[14] Other nations, particularly those like China, India, and South Korea, which have indicated an interest in seabed mining, could be invited to join such a system as well. That approach would operate with minimal bureaucracy and cost and would be confined to essentials--most important, developing a stable investment regime.

Supporters of the LOST point out that the convention covers other subjects, such as navigation and scientific research, and that those provisions are generally noncontroversial. They are also largely irrelevant, because most merely codify customary international law, proving that peaceful cooperation and global order can develop without a new UN agreement and organization.[15] As for the most serious questions of naval transit, few countries have the incentive or ability to interfere with American ships. Not once during the last decade has a U.S. vessel been denied freedom of transit. Anyway, it is the U.S. Navy, not the United Nations' LOST, that will ultimately guarantee American interests. If Part XI were acceptable, there would be little harm in acceding to the other provisions. But the nonseabed sections do not compensate for the flawed seabed mining regime.

Inadequate Repairs

True, the administration argues that it has transformed the treaty. "We have been successful in fixing all the major problems raised by the Reagan administration," explained Scholz. "We have converted the seabed part of the

agreement into a market-based regime."[16]

Well, not quite. Scholz and his colleagues did work hard to turn a disastrous accord into a merely bad one. The result is an improvement--and a dramatic testament to the distance that market ideas have traveled since the LOST was opened for signature in 1982. But the ISA remains an unnecessary boondoggle, intended only to hinder seabed development. The Enterprise continues to be an economic white elephant. The financial redistribution clauses remain a special-interest sop to poor states. And the entire system is likely to end up as bloated and politicized as the rest of the United Nations.

Moreover, for all their emphasis on individual problems, the negotiators have left a number of the worst ones unsolved. In places they have substituted ambiguity for clearly negative provisions. For instance, the treaty retains both the ISA, of undetermined size, and the Enterprise, an international version of the ubiquitous state enterprises that have failed so miserably all over the world.[17] The ISA remains almost comically complicated, with its Assembly and Council and such subsidiary bodies as the Finance Committee and the Legal and Technical Commission, all with their own arcane rules for agendas, membership, procedures, and votes. The LOST revisions restrict some of the ISA's discretion but still submerge seabed mining in the bizarre political dynamics of international organizations. Private firms must continue to survey and provide, gratis, a site for the Enterprise for each one they wish to mine. Anti-monopoly and anti-density provisions still apply disproportionately to American mining firms.

ISA fees have been lowered, but companies will continue to owe a $250,000 application fee and some, as yet undetermined, level of royalties and profit sharing. (The "system of payments," intones the compromise text, shall be "fair both to the contractor and to the Authority," whatever that means. Fees "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals," even though seabed production is more expensive, riskier, and occurs in territory beyond any nation's jurisdiction.)[18] The revised LOST establishes a new "economic assistance fund" to aid land-based minerals producers.[19] Surplus funds will still be distributed "taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status"--such as the Palestine Liberation Organization.[20] Theoretically, America could block inappropriate payments--at least as long as it was a member of the Finance Committee--but over time the United States would come under enormous pressure to be "flexible" and "reasonable."

Even some of the specific "fixes" look inadequate. Consider the voting system, admittedly a major improvement over the one in the original accord. According to the revised treaty, the United States would be guaranteed a seat on the Council, though still not a veto. The Council would consist of four chambers, any one of which could block action if a majority of its members voted no. On matters of serious interest, the United States probably could win the necessary extra two votes in its chamber to form a majority, but not necessarily. The career foreign service officers likely to represent most nations, including America, at the ISA would not want to be forever known as obstructionists. Moreover, that purely negative veto power does not guarantee that the ISA will act when required, to approve rules for mining applications, for instance.

An additional problem occurs because the land-based mineral producers, whose interest is antagonistic to the very idea of seabed mining, and "developing States Parties, representing special interests," such as "geographically disadvantaged" nations, each have their own chamber and thus a de facto veto over the ISA's operations.[21] Moreover, the qualification standards for miners are to be established by "consensus," essentially unanimity, which gives land-based producers as much influence as the United States. The possession of a veto provides them with an opportunity to extract potentially expensive concessions--new limits on production, for instance--to let the ISA function. Unfortunately, once the ISA asserted jurisdiction over seabed mining, potential producers would be hurt by a deadlock.

Indeed, production controls, one of the most perverse provisions of the original text, could recur under the revised agreement. The revision does excise most of article 151 and related provisions, which set a convoluted ceiling on seabed production to protect land-based miners. However, it leaves intact article 150, which, among other things, states that the ISA is to ensure "the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the area."[22] That wording would seem to authorize

the ISA to impose production limits. The United States might have to rely on its ability to round up allied votes to block such a proposal in the Council in perpetuity.

Funding remains a problem as well. The United States, naturally, would be expected to provide the largest share of the ISA's budget, 25 percent to start. How much that would be, we don't know; the budget is to be developed through "consensus" by the Finance Committee, on which the United States is temporarily guaranteed a seat ("until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses"),[23] and approved by the Assembly and Council. Years ago the United Nations estimated that the ISA could cost between $41 million and $53 million annually, on top of initial building costs of be- tween $104 million and $225 million.[24] The Clinton administration contends that the new agreement provides for "reducing the size and costs of the regime's institutions."[25] How? By adopting a paragraph in the revised text pledging that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective."[26] Similarly, states the new accord, the royalty "system should not be complicated and should not impose major administrative costs on the Authority or on a contractor."[27] Those sentiments might be genuine, but the new agreement changes none of the underlying institutional incentives that bias virtually every international organization, most obviously the United Nations itself, toward extravagance.

In fact, concern over bloated budgets was a major factor in Moscow's decision not to endorse the treaty. Russian ambassador Y. Ostrovsky explained to the General Assembly that though the revisions were "a step forward," he doubted the new agreement could achieve its goals. Of particular concern was the fact that "general guidelines such as necessity to promote cost-effectiveness cannot be seriously regarded as a reliable disincentive." Already-- before the treaty had even gone into force--Ambassador Ostrovsky pointed to "a trend to establish high-paying positions which are not yet required."[28] On that issue, at least, Russia has become more cost conscious and capitalist than the Clinton administration.

Technology Transfer

Finally, there is technology transfer, one of the most odious redistributionist clauses of the original convention. The mandatory requirement has been discarded, replaced by a duty of sponsoring states to facilitate the acquisition of mining technology "if the Enterprise or developing States are unable to obtain" equipment commercially.[29] Yet the Enterprise and developing states would find themselves unable to purchase machinery only if they were unwilling to pay the market price or were perceived as being unable to preserve trade secrets. The clause might be interpreted to mean that industrialized states, and private miners, whose "cooperation" is to be "ensured" by their respective governments, are then responsible for subsidizing the Enterprise's acquisition of technology.[30] Presumably, the United States and its allies could block such a proposal in the Council, but again, it is hard to predict future legislative dynamics and potential logrolling in an obscure UN body.

Moreover, the amended agreement leaves intact a separate, open-ended mandate for coerced cooperation. The ISA, states article 144, "shall take measures"

(b) to promote and encourage the transfer to developing States technology and scientific knowledge so that all States Parties benefit therefrom.

2. To this end the Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:

(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, inter alia, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.[31]

At best that wording suggests that Western firms would be expected to help equip and train their competition.[32] At worst it could end up authorizing some sort of mandatory system--one close to that originally intended by the LOST's framers. Ambiguous and obscure grants of power in the service of a highly politicized organization could turn out to be quite dangerous.

Conclusion

All in all, the LOST remains captive to its collectivist and redistributionist origins. Nevertheless, the administration appears to sincerely believe that it has made a good bargain. "This is a very important development for the United States because it gives us an opportunity to, in a market-oriented context, gain the benefits of some of the resources of the Law of the Sea," explained Secretary Christopher to Congress.[33] If only that were true. In fact, consumers worldwide are far more likely to gain the benefits of seabed minerals without the LOST.

Admittedly, the administration has made a bad treaty better. As Deputy Assistant Secretary Colson observed, the new accord "is quite an advance."[34] But that does not mean the LOST is acceptable. Created at a time when statism held sway internationally, the LOST remains a bad agreement. It is simply beyond fixing. The Senate should reject the treaty, consigning it to the ash heap of history where it belongs.

Notes

[1] Madeleine Albright, Statement to the 48th Session of the United Nations General Assembly, July 27, 1994, p. 2.

[2] For a more detailed discussion of the campaign for the New International Economic Order, 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.

[3] Preamble to The Law of the Sea: United Nations Conven tion on the Law of the Sea (New York: United Nations, 1983), p. 1.

[4] See Doug Bandow, "Developing the Mineral Resources of the Seabed," Cato Journal 2, no. 3 (Winter 1982): 793-96.

[5] Quoted in James Sebenius, Negotiating the Law of the Sea (Cambridge, Mass.: Harvard University Press, 1984), pp. 7-8.

[6] Ibid., p. 8.

[7] See Doug Bandow, "Do Not Endorse the Law of the Sea Treaty," Cato Institute Foreign Policy Briefing no. 29, January 27, 1994; and Doug Bandow, "UNCLOS III: A Flawed Treaty," San Diego Law Review 19, no. 3 (1982): 475-92.

[8] Quoted in Steven Greenhouse, "U.S., Having Won Changes, Is Set to Sign Law of the Sea," New York Times, July 1, 1994, p. A2.

[9] David A. Colson, "UN Convention on the Law of the Sea," U.S. Department of State Dispatch 5, no. 22 (March 30, 1994): 360.

[10] "Oceans Policy and the Law of the Sea Convention," undated State Department memorandum, p. 6.

[11] Elliot Richardson, "Treasure Beneath the Sea," New York Times, July 30, 1994, p. 19.

[12] The issue remains disputed, but the best argument is that customary international law remains unchanged for the powers that have refused to accept the LOST. See, for example, Bandow, "UNCLOS III," p. 479.

[13] Parties to the Moon Treaty "undertake to establish an international regime, including appropriate procedures, to govern the exploration of the natural resources of the moon." See Bandow, "Totalitarian Global Management," p. 6.

Although more nations have ratified the LOST--63 as of July 19, 1994, compared to 9 ratifiers of the Moon Treaty--no nation with a potential seabed mining industry--including India, normally thought of as a leader of the Third World, or China--has bound itself. The most recent ratifications have come from Bosnia, Comoros, and Sri Lanka, all unlikely participants in any undersea development. At least the ratifiers of the Moon Treaty include Australia, Austria, and the Netherlands, all advanced industrialized nations.

[14] For a more detailed discussion of the issue, see Bandow, "Developing the Mineral Resources of the Seabed," pp. 804-21.

[15] See Bandow, "Do Not Endorse the Law of the Sea Treaty," pp. 7-8.

[16] Quoted in Greenhouse, p. A1.

[17] The changes are described in "Law of the Sea: Report of the Secretary-General on His Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea," United Nations, New York, June 9, 1994.

[18] Ibid., sec. 8, para. 1(a)-(b), pp. 34-35.

[19] Ibid., sec. 7, para. 1(a), p. 34.

[20] Ibid., art. 160, 2(f)(i), p. 54.

[21] Ibid., sec. 3, para. 15(c), pp. 30-31. One chamber is solely for land-based producers. The "developing States Parties," in contrast, will share a chamber with other members, mainly other Third World countries, "elected according to the principle of ensuring an equitable geograph ical distribution of seats in the Council." Ibid., sec. 3, para. 15(d)-(e).

[22] Ibid., p. 47.

[23] Ibid., sec. 9, para. 3, p. 36.

[24] United Nations Office at Geneva Information Service, "Law of the Sea Conference to Resume Tenth Session at Geneva Beginning 3 August," U.N. Doc. SEA/140, 1981, pp. 6-7.

[25] Colson, p. 361.

[26] "Law of the Sea," sec. 1, para. 3, p. 21.

[27] Ibid., sec. 8, para. 1(c), p. 35.

[28] Y. Ostrovsky, Statement before the 48th Session of the United Nations General Assembly, July 28, 1994, pp. 1, 2, 3.

[29] "Law of the Sea," sec. 5, para. 1(b), p. 32.

[30] Ibid.

[31] Ibid., pp. 44-45.

[32] This provision is obviously intended to assist poorer states. However, technology, once transferred, must be used to be of value. But "cultural receptivity," in the words of economist Thomas Sowell, is critical. "The diffusion of technology is not simply a process of making information available or even transferring the embodied technology itself to other lands. Rusting Western machinery and decay ing Western factories in many Third World countries, in the wake of massive international aid programs, are a monument to the fallacy of believing that technology transfer is simply a matter of access, rather than of cultural receptiv ity as well." Thomas Sowell, Race and Culture: A World

View (New York: Basic Books, 1994), p. 8.

[33] Quoted in George Gedda, "U.S. Decides to Sign Sea Law Treaty," Washington Post, July 1, 1994, p. A4.

[34] Colson, p. 361.