

THE LAW OF THE SEA TREATY: *Turning the World's Resources Over to a Second United Nations*

by Doug Bandow

Bad treaties never die. Such is the lesson of the Law of the Sea Treaty, or LOST. Now being pushed by the Bush administration and Senate Foreign Relations Committee Chairman Joseph Biden (D-Del.), the treaty would turn over all of the world's unclaimed natural resources to a second United Nations.

Three decades ago the Third World was busy campaigning for a so-called New International Economic Order (NIEO), which combined demands for more foreign aid, UN regulation of business, and collectivist resource development.¹ LOST declared all seabed resources to be the “common heritage of mankind,” levied fees and royalties on Western mining and oil companies, created a monopoly company to mine the seabed, and established a new international body to divvy up the spoils.

President Ronald Reagan refused to sign the LOST in 1982, after which no major nation, even the Soviet Union, bound itself to the treaty. The agreement sank beneath the waves, leaving no trace.

But President George H.W. Bush decided to revive the LOST, reopening negotiations, which were concluded by the Clinton administration. Secretary of State Madeleine Albright won a few small concessions and proclaimed victory. The U.S. signed, setting off an international stampede. Although opposition in the Republican Senate prevented ratification, more than enough other countries assented, bringing LOST into effect. Now the LOST is before the Senate.

President George W. Bush is pushing the treaty, but obviously has not read it and the supposed “fix” of 1994.² Even the State Department acknowledged that the new “Agreement retains the institutional outlines of Part XI,” that is, the accord’s original collectivist framework.³

In broad sweep, LOST covers three subjects. The first area includes exclusive economic zones, fishing, marine research, ocean pollution, and oil exploration. These

provisions, though generally noncontroversial, are not without adverse effect. For instance, energy companies will owe the International Seabed Authority royalties up to 12 percent on any oil produced from the Outer Continental Shelf beyond 200 miles. This may be the first global tax imposed on Americans without congressional approval.

Moreover, advocates of a new kind of New International Economic Order hope to use the LOST for their own ends. William C.G. Burns of the Monterey Institute of International Studies calls LOST “a promising instrument through which such [legal] action might be taken, given its broad definition of pollution to the marine environment and the dispute resolution mechanisms contained within its provision.” A flood of international lawsuits under LOST could undermine U.S. prosperity and sovereignty.

Russia’s well-publicized submarine voyage under the North Pole has led to suggestions that America cannot dispute Moscow’s territorial claims outside of the treaty. However, the agreement respects the rights of nonmembers, while other interested parties, most notably Canada and Denmark, can resist Russia’s claims within LOST. Moreover, the Commission on the Limits of the Continental Shelf previously rejected Russian arctic territorial claims based in part on information supplied by the U.S., demonstrating that Washington need not be a member to protect American interests.⁴

Similarly, LOST’s affirmation of navigational freedom has won widespread support, including from the U.S. Navy. Yet most of the transit provisions incorporate existing customary international law. Moreover, there are ambiguities and uncertainties—whether, for instance, Washington can define which of its military transit activities are exempt from LOST restrictions.

The Bush administration proposes various “understandings” restricting the treaty’s reach. But other

nations have issued their own reservations, thereby limiting American rights. Moreover, there is no guarantee that the International Tribunal for the Law of the Sea or alternative arbitration forums would uphold America's positions. Jeremy Rabkin of George Mason Law School points out that any administration would "find it very awkward (to say the least) to reject the interpretations that emerge from international arbitration of its disputed points."⁵

In any case, paper guarantees would provide little aid in any crisis. Agreements with countries that control critical waterways, backed by a strong navy, offer the best protection of U.S. rights.

The most contentious issue is seabed mining. LOST establishes the International Seabed Authority (ISA), which is governed by a Council, Assembly, and various committees and commissions, and the Enterprise, to mine the seabed. Western mining operations will fund both their regulator, the Authority, and their competitor, the Enterprise. Monies collected will be handed out to Third World states, "liberation" movements, and whoever else the majority decides to shower with benefits.

Today's treaty supporters admit that the original accord, which limited production and mandated technology transfers, was flawed. But they claim that the LOST has been "fixed."

The best that can be said is that the Clinton administration made a horrible treaty slightly less horrid. The governing philosophy, regulatory structure, and most of the rules remain the same. Where explicit redistributionist provisions, such as requiring technology transfer, were dropped, other, more ambiguous language was left in place, which could have the same effect.

Finally, LOST still enshrines the basic principles of the NIEO as international precedent. Maybe ocean mining will never be viable, so turning vast resources over to yet another inefficient, politicized, and corrupt international organization won't matter. But such a byzantine regulatory structure is likely to discourage entrepreneurship in related fields, especially the development of technology, software, and other products with multiple ocean uses. Further, applying such a principle to other unowned resources, such as outer space, would discourage private innovation in that field.

Treaty proponents emphasize the treaty's precedential value. At the tenth anniversary celebration of the establishment of the ISA, Tanzanian Ambassador Joseph Warioba declared: "Above all the principle and concept

of the common heritage of mankind has been firmly established. The provisions of Part XI of the Convention have been diluted and weakened by later action but there is no denying the fact that the Convention put a stop to the colonization of the seabed beyond areas of national jurisdiction and established global management and administration under the Authority."⁶ If treaty advocates have their way, we can only imagine where they will seek to apply this precedent.

The LOST is not without benefits, but most can be enjoyed without ratifying the treaty. Unfortunately, the costs of joining are too high. Surely we should have learned by now that dirigiste economics will always fail. Enshrining collectivism as international law through creation of a mini-me United Nations would be as foolish as it would be costly.

¹See Doug Bandow, "Totalitarian Global Management: The UN's War on the Liberal International Economic Order," Cato Policy Analysis No. 61, October 24, 1985.

²"Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," United Nations General Assembly, August 17, 1994, A/RES/48/263.

³"Oceans Policy and the Law of the Sea Convention," undated State Department memorandum, p. 6.

⁴Cliff Kincaid, "Putin's Treaty Trap," *Washington Times*, September 2, 2007, p. B1.

⁵Jeremy Rabkin, "How Many Lawyers Does it Take to Sink the U.S. Navy?", *Weekly Standard*, September 10, 2007, Vol. 12, Issue 48, www.weeklystandard.com.

⁶*Proceedings of the Tenth Anniversary Commemoration of the Establishment of the International Seabed Authority* (Kingston, Jamaica: International Seabed Authority, 2004), p. 26.

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