

Don't Resurrect the Law of the Sea Treaty

by Doug Bandow

Executive Summary

For more than 20 years, the United States has refused to become a party to the Law of the Sea Treaty. Advocates of the treaty, a comprehensive measure governing navigational rights on the sea and mineral rights on the seabed, claimed that U.S. failure to join the convention would result in chaos on the high seas. It has not. Very few Americans know anything about the treaty, and even advocates are hard-pressed to explain how the United States would benefit from its adoption.

A round of changes to the document won the support of the Clinton administration, which signed the treaty in 1994, but those changes failed to attract sufficient support from the Senate. The LOST has languished unratified for more than 10 years.

The logjam appears to have broken, with prominent Republicans, and the president himself, signaling support for ratification. But the changes made to the LOST over the years have not altered its fundamental principles, which are collectivist in nature and inimical to U.S. interests. Most objectionable is Section XI, that portion of

the treaty governing seabed mining. The provisions of Section XI may have the effect of forever discouraging such operations, even where there might be huge benefits. Regulations are to be administered through a complicated system of committees and agencies within the International Seabed Authority, a creation of the United Nations that has ultimate jurisdiction over the agreement.

Funding for the ISA, and for enforcement of the LOST, would flow disproportionately from the United States. The ISA's current budget is modest, but the revised agreement changed none of the underlying institutional incentives that bias virtually every international organization, most obviously the UN itself, toward extravagance.

Some supporters of the treaty insist that the LOST is essential to establishing the rule of law on the high seas and will, therefore, aid in the fight against global terrorism. If the stakes are that high, it is crucial that the treaty be a good one. America's interests will be best served if the Senate rejects the LOST.

Doug Bandow is a senior fellow at the Cato Institute. He served as a special assistant to President Ronald Reagan and was a deputy U.S. representative to the Third UN Conference on the Law of the Sea.

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Introduction

More than two decades of negotiation culminated in 1982 when the Third United Nations Conference on the Law of the Sea (UNCLOS) approved the Law of the Sea Treaty. The United States was not among the more than 100 countries that signed the treaty. U.S. opposition was not without effect, however: the LOST, as the treaty is known, failed to gain the 60 ratifications necessary to make it take effect. Even the Soviet Union, which had proudly proclaimed its solidarity with the developing nations pushing the treaty, did not formally bind itself.

No one noticed the treaty's failure to take effect. Much of what the LOST covered was already customary international law. Navigation proceeded without hindrance. The most dramatic innovation, the seabed mining regime, proved unnecessary. Seabed mining turned out to be a bust rather than the financial bonanza once predicted; land-based production remained far more accessible and affordable than ocean operations. The international redistributionist campaign known as the New International Economic Order collapsed. It became evident that the sort of collectivist economics that wouldn't work domestically wouldn't work internationally.

Enthusiasm for international agreements remains strong in Washington, however, in spite of perceived Bush administration unilateralism. The Clinton administration, which renegotiated the treaty and proclaimed that the problems cited by President Ronald Reagan had been fixed, signed the revised treaty in 1994, setting off a stampede of foreign ratifications that brought the convention into effect in November of that year. But the Republican Senate refused to take up the LOST for ratification during Clinton's tenure in the White House. That reluctance changed after George W. Bush became president. In November 2004, analysts Benjamin and Daniel Friedman wrote of the "stunning array of interests" that had endorsed the LOST.¹ Senate Foreign Relations Committee chairman Richard Lugar (R-IN) won com-

mittee approval of the treaty last year with the support of President Bush. At her confirmation hearing before Lugar's committee, soon-to-be secretary of state Condoleezza Rice stated that the president "would certainly like to see it pass as soon as possible."²

Yet, despite that impressive line-up, the treaty has yet to reach the Senate floor. Rather than acknowledge any flaws in the convention, Benjamin and Daniel Friedman charged that the LOST was blocked by "a few zealots" who were "cowering the White House and Senate."³ Tying up the treaty was a surprisingly impressive achievement for just "a few zealots." Nevertheless, a spokesman for Senator Lugar called Secretary Rice's comments "a breakthrough" and promised that the treaty would go to the floor "sooner rather than later."⁴

Even some critics of the treaty argue that the specifics don't matter—for example, if there's no seabed mining, the regulatory regime is irrelevant, no matter how awful. So why not ratify the convention?

Because a bad agreement is a bad agreement. If seabed mining ever becomes economical, it could be crippled by the LOST's unnecessarily complicated rules. The precedent the treaty sets is even worse. The LOST creates a collectivist, highly politicized system to govern much of the unowned resources of mankind. The more than two decades since treaty negotiations began have demonstrated that markets are not only more efficient but are more equitable than central control—particularly when the control is exercised by multilateral international institutions. At a time when the spread of free economic systems has proved to be a boon for the world's poor, the LOST is a step back into the collectivist past.

What Is the LOST?

President Truman's 1945 proclamation asserting U.S. jurisdiction over America's continental shelf, and similar extensions of national control by other states, served as the genesis for the LOST, because it prompted

renewed interest in property rights on the seabed. The desire to standardize those sorts of international claims led to the first UN Conference on the Law of the Sea (UNCLOS I), which gathered in 1958 to deal with resource jurisdiction 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 to be the “common heritage of mankind.” A Seabed Committee was established, eventually leading to UNCLOS III, which first met in 1973. Nine years and 11 sessions later, a treaty was born.

The LOST, which runs 175 pages and contains 439 articles, covers seabed mining, navigation, fishing, ocean pollution, and marine research, as well as the creation of economic zones (subject to national regulation). Much of the treaty is unobjectionable, or at least unimportant when in error. The navigation sections codify current transit freedoms and are thus a modest plus.

Very different is Part XI, as the provisions governing seabed mining beyond national jurisdiction are called. So flawed is this section that it can be truly “fixed” only by tearing it up.

The LOST’s fundamental premise is that all unowned resources on the ocean’s floor belong to the “people of the world”—effectively the UN. But an international regulatory system would likely inhibit development, depress productivity, increase costs, and discourage innovation, thereby wasting much of the benefit to be gained from mining the oceans. The Byzantine regime created by the LOST was, and remains, almost unique in its perversity. In the original agreement, the UN would have asserted its control through the International Seabed Authority, ruled by an Assembly dominated by poorer nations and a council that would regulate deep seabed mining and redistribute income from the industrialized West to developing countries. The ISA would employ as its chief subsidiary to mine the seabed a body called the Enterprise, which would enjoy the coerced assistance of Western mining companies.

As originally written, the treaty was explicitly intended to restrict mineral development. Among the treaty’s objectives were “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 explicitly limited mineral production and authorized commodity cartels (rather like OPEC). Further, the treaty placed a moratorium on the mining of some resources, such as sulfides, until the Authority adopted rules and regulations—which might never have happened.

The procedures governing mining reflected that anti-production bias. A firm would have been required to survey two sites and turn one of them over *gratis* to the Enterprise before even applying for a permit. The Authority had the power to deny an application if the operation would violate the treaty’s anti-density and anti-monopoly provisions, aimed at U.S. operators. And the ISA’s decisions in this area were to be set by a subsidiary body, the Legal and Technical Commission. Developing countries would dominate the 36-member council, as they did the Assembly, leaving access of American firms to the deep seabed (that beyond national jurisdiction) dependent on the whims of countries that might oppose seabed mining for economic or political reasons.

Who Would Want to Bid?

Under the original LOST, it is not clear why a firm would have wanted to bid, even if it thought it could win approval. The convention would have required private entrepreneurs to transfer their mining technology to the Authority, for use by the Enterprise and developing states. The term “technology” was so ill-defined that the Authority might have been able to claim engineering and technical skills as well as equipment, yet the treaty imposed no effective penalties on transferees for improper disclosure or misuse of technology. Miners would also have been required to pay their overseer, the ISA, and

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their competitor, the Enterprise, \$500,000 to apply and \$1 million annually plus a royalty fee. The sponsoring country would have been responsible if a firm failed to pay; moreover, the industrialized West would have had to provide interest-free loans and loan guarantees, for which Western taxpayers would have been liable in the event of a default, to the UN's mining operation.

All told, the Enterprise was to enjoy free mine site surveys, transferred technology, and Western subsidies. The Enterprise would have also been exempt from Authority taxes and royalty payments. Also favored were developing states and "land-locked and geographically disadvantaged" countries (there were 105 of the latter when the convention was concluded, and there are even more today).

Even the attenuated private right to mine the seabed could have been dropped at the review conference, to be held 15 years after the commencement of commercial operations, if three-fourths of the member states so decided. The mere possibility of a Third World majority effectively confiscating potentially enormous investments made over more than a decade would have discouraged private entrepreneurs. That, in turn, would have given the well-pampered Enterprise and likely state-subsidized firms of developing states a further advantage over their private competitors from the West.

Collectivism or Chaos?

It was Arvid Pardo, then ambassador to the United Nations from the island nation of Malta, who in a speech to the General Assembly in 1967 coined the phrase the "common heritage of mankind" to encapsulate the philosophy underlying the LOST. Years later, though, Pardo called the system envisioned by the LOST "fatally flawed" and complained that it could "prove to be an enduring economic burden on the international community."⁵

Still, some proponents of the treaty contended that no matter how unfavorable the LOST might be for international mining—most important, manganese (polymetallic)

nodules, polymetallic massive sulfides, and cobalt-rich ferromanganese crusts—it was better than nothing. Without some security of tenure in deep-sea mining sites, supporters of the treaty contended, companies will not invest the millions necessary to begin operations. Certainly firms will not take the potentially enormous risks of such a new venture if they might face conflicting site claims.

However, most businessmen understand that it makes little difference whether or not, say, Congo, recognizes their right to harvest manganese nodules in the Pacific. Indeed, given the dynamics of seabed mining, it probably doesn't even matter if other *industrialized* nations with firms capable of mining the ocean floor recognize one's claim. In all but the most unusual cases, the seabed's irregular geography 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 have been quite simple to build an alternative to the LOST. In 1980 Congress passed the Deep Seabed Hard Minerals Act to provide interim protection for American miners until Congress ratified an acceptable 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 have been upgraded into a formal treaty, authorizing each nation to oversee its own companies' activities and creating a mechanism for resolving conflicts. No international bureaucracy would have been necessary.

Instead, the LOST creates a horribly complex regulatory system, meaning that, in this case, a bad treaty is worse than no treaty. As the LOST was being negotiated, the American Mining Congress observed the following:

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.”⁶

Putting Old Wine in New Wineskins

The U.S. refusal to sign the treaty after its completion in 1982 generated anguish among internationalists, but the world has since moved America's way. As mineral prices declined, so too did the prospects of massive resource harvests from the seabed. Poorer states saw their expected LOST windfall disappear. And, as developing countries started liberalizing their economies, they backed away from the wide-ranging “New International Economic Order,” a concerted international campaign in the 1970s and 1980s that sought to promote income redistribution from the industrialized “North” to the impoverished “South.” By the early 1990s some Third World diplomats were privately admitting that the Reagan administration had been right to kill the treaty.⁷

But some bad ideas seem never to die, especially in Washington. Policy proposals simply lie dormant, waiting for a sympathetic bureaucrat or politician to revive them. Indeed, international treaties attract State Department negotiators like moths to a flame. Washington should have pressed to separate seabed mining from other maritime issues if it desired to return to the issue. Instead, the George H. W. Bush administration began consultations with other nations to “fix” the LOST in 1990, and that process accelerated under the Clinton administration.⁸

After getting other leading states to agree to changes in some of the treaty's most burdensome provisions, the State Department enthusiastically promoted the agreement.⁹ 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.”¹⁰ Two days later the Clinton administration formally affixed its signature to the convention.¹¹ On November 16, the required 68th country ratified the LOST, bringing it into effect. Clinton officials argued that they had transformed the treaty. “We have been successful in fixing all the major problems raised by the Reagan administration,” explained chief State Department negotiator Wesley Scholz. “We have converted the seabed part of the agreement into a market-based regime.”¹²

The George W. Bush administration is now making a similar argument. The Department of State's legal adviser, William H. Taft IV, testified before the Senate that the changes in “the 1994 Agreement overcome each one of the objections of the United States to Part XI of the convention and meet our goal of guaranteed access by the U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions.”¹³ John F. Turner, assistant secretary of state for oceans and international environmental and scientific affairs, contends that “the changes set forth in the 1994 Agreement meet our goal of guaranteed access by U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions.”¹⁴ Ocean affairs writer George Galdorisi argued that “previous U.S. objections to the convention have been resolved.”¹⁵ Similarly, Friedman and Friedman exult that “twelve years of further negotiation [after Reagan's 1982 rejection of the accord] got the United States what it wanted.”¹⁶

Not quite, actually. At the final session of the Third United Nations Conference on the Law of the Sea in New York in 1982, the U.S. delegation submitted an extensive list of proposed amendments.¹⁷ They were rejected out of hand, even though the Reagan administration's proposals retained the overall “parallel system” (the Enterprise alongside private miners). In other words, the Reagan amendments would have only applied bandages to an underlying system that was flawed from its inception.

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The same thing can be said of the 1994 amendments. The Clinton administration succeeded in turning a disastrous accord into a merely bad one, but the treaty has not been “fixed.” In places the negotiators substituted ambiguity for clearly negative provisions. 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. Nevertheless, the original collectivist framework remains. Even the State Department acknowledged that the new “agreement retains the institutional outlines of Part XI.”¹⁸

The revised treaty, now in effect, still creates a Rube Goldberg system—with the ISA, the Enterprise, the council, the Assembly, and more—that is likely to become yet another multilateral boondoggle.¹⁹ The LOST retains revenue sharing, international royalties, a veto for land-based minerals producers in the council, and the like. The publicly run Enterprise is an international version of the ubiquitous government enterprises known as parastatals that have failed so miserably in almost every debt-ridden Third World nation. The financial redistribution clauses remain a special-interest sop to poor states. Facing the usual incentives afflicting any organization that separates those who fund it from those who dominate it, the ISA is likely to end up as bloated and politicized as the UN, especially if the United States joins and begins funding the system.

Today, with a minerals market that discourages development of seabed mining, the ISA sometimes emphasizes the trivial. It generates lots of reports and paper. Protecting “the emblem, the official seal and the name” of the ISA, as well as “abbreviations of that name through the use of its initial letters,” has become one of the ISA’s missions.²⁰ Among the other crises the ISA has confronted: in April 2002 the Jamaican government turned off the ISA’s air conditioning, necessitating “urgent consultations with the Ministry of Foreign Affairs and Foreign Trade.”²¹ One year later Jamaica used the same tactic in the ongoing battle over ISA payments for its facility.²² Nearly

half of the ISA members were behind on their dues; as of mid-May 2003, 49 were “in arrears” for more than two years, placing their voting privileges at risk.²³ The LOST revisions restrict some of the ISA’s discretion but still submerge seabed mining in the bizarre political dynamics of international organizations. The Assembly chooses the council. The council chooses the Legal and Technical Commission, which establishes rules governing mining.

A prospective miner would have to fulfill those requirements now being drafted at the ISA in Jamaica and win commission approval for its particular work plan, which would then go to the council for a final decision. Depending on the ISA rules ultimately adopted, a company might be denied permission to mine on the basis of anti-monopoly and anti-density provisions that would apply disproportionately to American (and Western) mining firms. Assuming a company surmounted that hurdle, it would, after paying potentially substantial survey costs, have to “relinquish some of” its “exploration areas” to the Enterprise.²⁴ The miner would have to specify its maximum expected production, limiting potential revenue, and, as noted below, might have to share its proprietary technology.

Moreover, the company might have to pay the ISA for the privilege of mining. ISA fees under the revised treaty have been lowered, but companies would 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,” as if that has any practical meaning. 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.²⁵ The revised LOST establishes a new “economic assistance fund” to aid land-based minerals producers.²⁶ Surplus funds would 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” (for example, the Palestinian Authority), a provision unchanged by the 1994 agreement.²⁷ Theoretically, the United States could block payments it opposed—at least as long as it was a member of the Finance Committee—but over time U.S. ISA representatives would feel enormous pressure from their peers to be “flexible” and “reasonable.” Such pressure is less likely to be resisted by a U.S. administration that supports the ISA, especially since the stakes seem less important than those even at the UN.

In fact, economic redistribution has been an important objective for the ISA during its short life. For example, a proposal was made recently for an African Institute of the Oceans, as if that were the highest priority for countries suffering from civil war, economic collapse, and social chaos. Voluntary trust funds have been established to aid developing countries, though few individuals or nations have rushed forward to contribute, and, in the end, the ISA filled the fund coffers itself.²⁸

The International Tribunal for the Law of the Sea is supposed to offer dispassionate adjudication of disputes. Yet membership is decided by quota: each “geographical group” is to have at least three representatives.²⁹ That is a modest improvement over the original scheme: five members each for Africa and Asia, four each for the “Western European and Others Group” and Latin America, and three for Eastern Europe.

The voting system has been improved, but the changes are inadequate. According to the revised treaty, the United States would be guaranteed a seat on the council, though still not a veto. The 36-member council is divided into four chambers of varying size, with members chosen from minerals consumers, seabed investors, minerals producers, developing nations, and others, respectively. The United States could be elected in any one of the first three chambers but is promised a seat in the first one (for minerals producers). Since Washington has not ratified the treaty, the United States is currently not a member of the council. If the United States did ratify the

treaty, however, and took its seat in the council, a majority of members voting no in any one of the four chambers could block action. On matters of serious interest, the United States probably could win the necessary votes to form a majority in its chamber, but not necessarily. The career foreign service officers likely to represent most nations in the ISA would not want to be forever known as obstructionists. Moreover, this purely negative veto power does not guarantee that the ISA would act when required, and could be used by other countries to delay or impede the approval of mining applications, for instance.

Land-based mineral producers are generally opposed to the very idea of seabed mining. Yet they, as well as the “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.³⁰ Thus, the voting power of such groups essentially matches that of America. Moreover, the qualification standards for miners are to be established by “consensus,” essentially unanimity, which could give 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, or increased redistributionist payments under the treaty—to let the ISA function. Unfortunately, once the Authority asserts jurisdiction over seabed mining, potential producers would be hurt by a deadlock.

Indeed, production controls, one of the most controversial provisions in the original text, are preserved in the new agreement. The revision does excise most of LOST Article 151 and related provisions, which set convoluted regulatory restrictions on seabed production. 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.”³¹ That wording would seem to

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authorize the ISA to impose production limits. The United States might have to rely on its ability to round up 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 is impossible to predict; 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").³² After the Finance Committee vote, the budget must be approved by the Assembly and the council. Years ago the United Nations estimated that the ISA would cost between \$41 million and \$53 million annually, on top of initial office construction costs of between \$104 million and \$225 million.³³ The Clinton administration contended that the revised agreement provided for "reducing the size and costs of the regime's institutions."³⁴ How? By adopting a paragraph pledging that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective."³⁵ Similarly, states the amended accord, the royalty "system should not be complicated and should not impose major administrative costs on the Authority or on a contractor."³⁶

These sentiments might be genuine. So far the ISA has been spending only about \$5 million annually. But then, the world's wealthiest nation is not yet a member. Moreover, the revised agreement has changed none of the underlying institutional incentives that bias virtually every international organization, most obviously the UN itself, toward extravagance.

In fact, concern over bloated budgets was a major factor in Moscow's initial decision in 1994 not to endorse the treaty. (Russia has since ratified the LOST.) Russian ambassador to the UN Yakov Ostrovsky explained to the General Assembly that though the revisions were "a step forward," he doubted the new agreement would limit costs. Of particular

concern was the fact that "general guidelines such as necessity to promote cost-effectiveness cannot be seriously regarded as a reliable disincentive [to spending]." Before the treaty had even gone into force Ambassador Ostrovsky pointed to "a trend to establish high-paying positions which are not yet required."³⁷

Technology Transfer

The technology transfer provisions constitute one of the most odious redistributionist clauses left over from the original text. The mandatory transfer requirement has been 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.³⁸ Yet the Enterprise and developing nations would find themselves unable to purchase machinery only if they were unwilling to pay the market price or preserve trade secrets, or if a government restricted the sale of the technology because it had important dual-use capabilities. The new clause might be interpreted to mean that industrialized states and private miners, whose "cooperation" is to be "ensured" by their respective governments,³⁹ are therefore responsible for mandating and subsidizing the Enterprise's acquisition of technology. Presumably the United States and its allies could block such a proposal in the council, but, again, it is hard to predict the future legislative dynamics and potential logrolling in an obscure UN body in upcoming years.

Moreover, the amended agreement leaves intact a separate, open-ended mandate for coerced collaboration. "The Authority," states Article 144, "shall take measures"

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

2. To this end the Authority and [member nations] shall co-operate in promoting the transfer of technology and

scientific knowledge. . . . In particular they shall initiate and promote:

- (a) programmes for the transfer of technology to the Enterprise and to developing States . . . 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.⁴⁰

At best this suggests that Western firms would be expected to help equip and train their competitors.⁴¹ 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 are likely to prove harmful to U.S. interests.

At issue is not only technology useful for seabed mining. Dual-use technologies with military applications, for instance, might also fall under ISA requirements. Peter Leitner, a Department of Defense adviser, points out that those technologies might include "underwater mapping and bathymetry systems, reflection and refraction seismology, magnetic detection technology, optical imaging, remotely operated vehicles, submersible vehicles, deep salvage technology, active and passive military acoustic systems, classified bathymetric and geophysical data, and undersea robots and manipulators."⁴² Acquisition of those and other technologies could substantially enhance the undersea military activities of potential rivals, most notably China, which already has purchased some mining-capable technologies from U.S. concerns. The justification for granting U.S. government approval for past transfers to China, explains Leitner, was Beijing's status as a miner under the LOST.⁴³

The treaty has become a solution in search of a problem. True, Elliot Richardson, who led the American delegation to the UN during the Carter administration, claimed that

the UN's mere assertion that the ocean resources were the "common heritage of mankind" had abrogated any right to mine the seabed without the UN's approval. Richardson warned that "if any mining defied international law, its output would be subject to confiscation as contraband."⁴⁴ Ambassador Richardson did not explain who he believed would do the seizing—a UN navy?

More important, until Washington ratifies the LOST, U.S. citizens are at liberty to mine the seabed.⁴⁵ Americans have incurred no treaty obligations—to fund the ISA, subsidize developing states, or transfer technology, for example. That makes it all the more important that the United States reject the accord. If the United States ever joins the ISA, a future renunciation of the LOST might not be considered enough to reestablish Americans' traditional freedoms on the high seas.

Admittedly, objections based on seabed mining might seem to be of little importance today since the promise of recovering ocean resources is far less bright than it was when UNCLOS convened. But operations might still become economically feasible in coming years, especially as technological innovation makes the mining process less expensive. Principle is also important. Even if no minerals are ever lifted commercially from the ocean's floor, the LOST remains unacceptable because of its coercive, collectivist philosophical underpinnings, most notably the declaration that all seabed resources are mankind's "common heritage" under the control of a majority of the world's nation states.

The New International Economic Order

UNCLOS III was held in a different era, at 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 multilateral organizations were promoting the New International Economic Order, which was to engineer massive wealth redis-

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tribution from the industrialized to the underdeveloped states. Indeed, much of the LOST, particularly the provisions regarding seabed mining, was dictated by the so-called Group of 77, the developing states' lobby.

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 activism by a veritable alphabet soup of UN agencies—CTC, ILO, UNCTAD, WHO, and WIPO.⁴⁶ Ambassador Pardo, the Maltese official who was once a leading proponent of the LOST, then argued that American acceptance of the treaty “however qualified, reluctant, or defective, would validate” international political control of private economic activities, or what he euphemistically termed “the global democratic approach to decision making.”⁴⁷

Luckily, economic reality has since hit many poorer nations. Even formerly kleptocratic one-party states such as Mexico, authoritarian collectivist regimes such as Tanzania, and formally communist states such as Vietnam have moved in varying degrees toward market economies. Before Ronald Reagan left office, 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 subject the United States to the treaty's restrictive regulatory regime and enshrine in international law some very ugly precedents. One is that the nation-states (not peoples) of the world collectively own all the unclaimed wealth of this earth. Granting ownership and control to petty autocracies that have no relationship to the resources and no ability to contribute anything to their development makes neither moral nor practical sense. Much better on both counts is the simple Lockean notion 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.

The Lockean standard would better suit the interests of developing peoples. The LOST

may purport to promote international justice, fairness, and cooperation, but, in fact, it advances none of those things. 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 still mandate global redistribution of resources, create a monopolistic public mining entity, restrict competition, and require the transfer of technology. Those principles, even in the attenuated form of the revised treaty, reflect the sort of statist panaceas that were discredited by the historical wave that swept away Soviet-style communism.

Countervailing Benefits?

Throughout its development some observers acknowledged the treaty's failings but contended that it had enough positive benefits to warrant signing. 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.”⁴⁸

The gains in other areas are limited. Many of the nonseabed provisions are marginally beneficial to U.S. interests, and a number are somewhat harmful. The treaty's authorization of 200-mile exclusive economic zones (EEZs) merely reflects what has become customary international law. Sections governing fishing and maritime research also make few changes to current law. In contrast, the territorial boundary-setting process strips some nonseabed resources away from the United States; the pollution provisions restrict America's ability to control some emission sources; and the U.S. government might eventually have to share oil revenues with the ISA from development of the outer continental shelf beyond 200 miles. All of these change existing practices.

The navigation provisions are perceived by supporters as being of far greater importance

than hypothetical concerns about offshore mining and drilling rights. For instance, Rear Adm. William Schachte Jr., a Pentagon official who backed the LOST during the Reagan years, argued that the document was vital to guarantee American naval rights. Washington's refusal to sign the LOST left critics predicting chaos and combat on the high seas two decades ago; yet we have witnessed not one such incident as a result of the failure to implement the LOST.

Nor is the treaty unambiguously favorable to transit rights. The document introduces some new limitations on navigation involving the EEZs, territorial seas, and water surrounding archipelagic states. Even seemingly innocent restrictions might have a negative impact; Alfred Rubin of Tufts University worried that the ban on "research or survey activities" could limit U.S. naval transit rights.⁴⁹

At other times the LOST's language is ambiguous—regarding transit rights for submerged submarines, for instance—which ultimately limits the value of the treaty guarantee. Ambassador Pardo complained that the treaty "is often studiously unclear, and predictability suffers."⁵⁰ Louisiana State University law professor Gary Knight argued that "the difficulty of establishing our legal right to EEZ navigation [through other nations' exclusive economic zones] and submerged straits passage [for submarines] would be no more difficult under an existing customary international law argument than under the convoluted text of the proposed UNCLOS."⁵¹ In short, there is only a modest theoretical advantage for which to trade away the mining provisions.

Even if the LOST offered a definite and positive interpretation of navigation provisions, the legal protections for free transit would provide little practical gain. Benjamin and Daniel Friedman contend: "By signing the Convention, the United States gives added weight and stability to customary rights, and pushes recalcitrant states to respect navigational freedoms."⁵² Administration representatives make the same argument: "The navigation and overflight freedoms we require through customary international law are better served by being a party to the Convention

that codifies those freedoms," testified Adm. Michael G. Mullen, then vice chief of naval operations for the Joint Chiefs of Staff.⁵³

That's true, but it doesn't go very far. The now-retired Admiral Schachte acknowledged in Senate testimony: "The Convention alone is not enough, even [with the United States] as a party. Our operational forces must continue to exercise our rights under the Convention."⁵⁴ That is, to protect American navigation rights from foreign encroachments, the U.S. Navy must regularly conduct military operations on the basis of the international transit freedoms claimed by Washington, regardless of whether or not the United States ratifies the LOST. Meanwhile, the LOST is unlikely to influence countries that have either the incentive or the ability to interfere with U.S. shipping. In practice, few do: nations usually have far more to gain economically from allowing unrestricted passage.

However, when countries perceive their vital national interests to be at stake—Great Britain in World War I and Iran during its war with Iraq in the 1980s, for instance—they rarely allow juridical niceties to stop them from interdicting or destroying international commerce. In a crisis, most maritime nations are ready to sacrifice abstract legal norms in pursuit of important policy goals.

Indeed, LOST membership has not prevented Brazil, China, India, Malaysia, North Korea, Pakistan, and others from making ocean claims deemed by others to be excessive—and, thus, illegitimate—under the treaty. In testimony last October, Admiral Mullen warned that the benefits he believed were derived from treaty ratification did not "suggest that countries' attempts to restrict navigation will cease once the United States becomes a party to the Law of the Sea Convention."⁵⁵

As for military transit, the United States should concentrate on maintaining good relations with the handful of countries that sit astride important sea-lanes. At a time when Washington is combating lawless terrorism, it should be evident that the only sure guarantee of free passage is the power of the U.S. Navy.

To protect American navigation rights, the U.S. Navy must regularly conduct military operations regardless of whether or not the United States ratifies the LOST.

**The impact of
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Of course, even with friendly nations, Washington would prefer not “to have to use muscle to exercise our rights,” observed Carter-era LOST negotiator Elliot Richardson.⁵⁶ Moreover, Mark T. Esper, deputy assistant secretary of defense for negotiations policy in the Bush administration, told the Senate that sea-lanes and air lanes should “remain open as a matter of international legal right—not contingent upon approval by coastal and island nations along the route or in the area of operations.”⁵⁷ But LOST or no LOST, those rights will remain contingent on the ability and willingness of other countries to hinder free transit and of the United States to overcome such hindrances.

Consider the luckless USS *Pueblo*. International law did not prevent North Korea from illegally seizing the intelligence ship; had there been a LOST in 1968, it would have offered the *Pueblo* no additional protection. America was similarly unaided by international law in its confrontation with China over the U.S. EP-3 surveillance plane operating in international airspace in 2001.

Schachte contends that “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.”⁵⁸ Yet Iran, which bombed Kuwaiti oil tankers during its war with Iraq, is unlikely to be deterred by an international treaty, however unambiguous its provisions. If Iran, or any other maritime state, believed it to be in its vital interest to prevent the passage of U.S. ships, then its signature on the LOST would not likely prevent it from acting; rather, the country would be primarily concerned about America’s willingness and ability to force passage. And in a world from which the Soviet Union has disappeared, the Russian navy is rusting in port, China has yet to develop a blue-water navy, and Third World conflicts are no longer viewed as threatening the United States, Washington is rarely going to have to fight its way through contested international waterways. Countries will be inclined to let the ships pass rather than face the wrath of the U.S. Navy.

Moreover, the administration’s positive assessment of the treaty depends on Washington’s ability to insulate military operations from the LOST. In his October 2003 testimony, the State Department’s William H. Taft IV noted the importance of conditioning acceptance “upon the understanding that each Party has the exclusive right to determine which of its activities are ‘military activities’ and that such determination is not subject to review”—in other words, which activities are or are not covered by the LOST.⁵⁹ Whether other members will respect that claim is not certain. Admiral Mullen acknowledged the possibility that a LOST tribunal could assert jurisdiction over American military operations, resulting in a ruling that adversely impacted “operational planning and activities, and our security.”⁶⁰

Indeed, the impact of the LOST on President Bush’s Proliferation Security Initiative (PSI), aimed at hindering international shipments of weapons of mass destruction (WMD) materials, is uncertain. Treaty advocates contend that the LOST would provide an additional forum through which to advance the PSI. Assistant Secretary of State John F. Turner testified before the Senate that “joining the Convention would strengthen PSI efforts.”⁶¹ At the very least, “it imposes no new restrictions,” write Daniel and Benjamin Friedman.⁶²

That isn’t so clear, however. Adherence to the LOST might constrain Washington’s ability to intercept weapons shipments that are problematic, but legal, under existing international law, and that remain so under the treaty. After all, any anti-proliferation policy treats nations differently on the basis of the subjective assessment of the stability and intention of a particular government. The LOST makes no such distinctions. At best, the treaty is ambiguous regarding the seizure of WMD shipments. Controversy is inevitable; China and India already have insisted that the PSI is barred by the treaty. Ratification of the LOST might have the effect of adopting ambiguity as law, which would not strengthen Washington’s position.

Convention advocates further contend that even if the LOST is flawed, only partici-

pation in the treaty regime can prevent future damaging interpretations, amendments, and tribunal decisions. Bernard Oxman, a University of Miami Law School professor who also serves as a judge ad hoc on the International Tribunal for the Law of the Sea, contends that “what we gain by becoming party is increased influence over” the interpretation of the convention’s rules.⁶³ Senator Lugar worries that failing to ratify the treaty means the United States could “forfeit our seat at the table of institutions that will make decisions about the use of the oceans.”⁶⁴ David Sandalow of the Brookings Institution warns that if the United States stays out of the LOST, it risks losing some of its existing navigation freedoms through “backsliding by nations that have put aside excessive maritime claims from years past.”⁶⁵

However, America’s friends and allies, in both Asia and Europe, have an incentive, with or without the LOST, to protect navigational freedom. So long as Washington maintains good relations with them—admittedly a more difficult undertaking because of strains of the war in Iraq—it should be able to defend U.S. interests indirectly through surrogates. If the nations that benefit from navigational freedom are unwilling to aid the United States while Washington is outside the LOST, they are unlikely to prove any more steadfast with Washington inside it. Assistant Secretary Turner admitted as much when he told the Senate Foreign Relations Committee in October 2003 that the United States had “had considerable success” in asserting “its oceans interests as a non-party to the Convention.”⁶⁶

Critics of the U.S. refusal to sign in 1982 predicted ocean chaos, but as noted earlier, not once has an American ship been denied passage. No country has had either the incentive or the ability to interfere with U.S. shipping, and, if one or more had, the LOST would have been of little help. In 1998 treaty supporters agitated for immediate ratification because several special exemptions for the United States were set to expire. Washington did not ratify and no one seemed to notice.

Ironically, problems cited by U.S. shippers—

creation of a “particularly sensitive sea area” off of Europe, for instance—have involved alleged misinterpretations of the treaty, not America’s lack of membership.⁶⁷ And foreign shippers have attempted to use the LOST to escape application of U.S. environmental controls.⁶⁸ Joining the treaty would provide no panacea.

Finally, the LOST may encourage the UN to venture into unexplored territory. The UN’s Division for Ocean Affairs and the Law of the Sea boldly announced that the LOST “is not . . . a static instrument, but rather a dynamic and evolving body of law that must be vigorously safeguarded and its implementation aggressively advanced.”⁶⁹ If international jurists exhibit the same creativity as shown by some judges domestically, the LOST might prove to be dangerously dynamic.

In 2001 Douglas Stevenson, representing the Seamen’s Church Institute, an advocacy group for mariners, complained about “trends that erode traditional seafarers’ rights,” such as that to medical care, as well as to protection from abandonment by insolvent and irresponsible ship owners. Stevenson explained, “When mariners’ health, safety or welfare is in jeopardy, we look to the United Nations Convention on the Law of the Sea to protect them.”⁷⁰ There are obviously real and tragic abuses of seamen, but what the “international community” should do as part of the LOST about such issues is not obvious. Washington might find itself facing unexpected obligations if it signs on.

Conclusion

The LOST attracts some adherents because it is so big and comprehensive. Writes George Galdorisi, the LOST

has become more than just another treaty. As the result of the largest single international negotiating project ever undertaken, it founded a new era on, under and over the world’s seas and represented to the treaty’s 157 signatories, a commitment to the rule of law

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America's interests are best served if the Senate rejects the LOST.

and a basis for the conduct of affairs among nations over a majority of the globe—a rule of law that the United States must promote and sustain if it is to succeed in endeavors such as the global war on terrorism.⁷¹

If the stakes are that high, it is even more important that the treaty be a good one. Someday seabed resources might be worth recovering, giving life to the provisions of Part XI of the treaty, which govern seabed mining. In the meantime, there is no reason for the United States to lock itself into a burdensome and convoluted regulatory regime that sets undesirable precedents.

Unfortunately, notwithstanding the 1994 revisions, the LOST remains captive to its collectivist and redistributionist origins. It is a bad agreement, one that cannot be fixed without abandoning its philosophical presupposition that the seabed is the common heritage of the world's politicians and their agents, the International Seabed Authority and the Enterprise.

But the issue of whether to ratify the LOST involves more than abstract philosophical principles. Provisions such as those covering technology transfers could put America's national security at risk. Improvements in transit rights and other areas would be modest, at best. America's interests are best served if the Senate rejects the LOST.

Notes

1. Benjamin Friedman and Daniel Friedman, "How the Law of the Sea Convention Benefits the United States," Bipartisan Security Group, November 20, 2004, p. 1.

2. Quoted in Thomas Kilgannon, "Will Law of the Sea Treaty Sink or Swim?" *Washington Times*, February 11, 2005, p. A19.

3. Friedman and Friedman, p. 1. A Lugar staffer said the senator did not push the treaty last session so as not to "rile the activists," but didn't admit to being "cowed." As quoted in Ron Strom, "Sovereignty-Sapping U.N. Accord Gets New Life," *WorldNet Daily*, January 25 2005, www.worldnetdaily.com/news/

article.asp?ARTICLE_ID=42528.

4. Quoted in Strom.

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

6. American Mining Congress, "Undersea Mineral Resources," statement (xerox), September 27, 1981, in author's possession.

7. Author's conversations with American diplomats in 1991 and 1992.

8. See, e.g., United Nations Division for Ocean Affairs and the Law of the Sea, "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982: Overview," www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm.

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

10. Madeleine Albright, Statement to the 48th Session of the United Nations General Assembly, July 27, 1994.

11. The LOST and 1994 agreements were to be treated as a package. However, as of August 31, 2005, 149 nations had ratified the convention but only 122 had ratified the 1994 agreement. See United Nations Division for Ocean Affairs and the Law of the Sea, "Status of the United Nations Convention on the Law of the Sea, of the Agreement Relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm, accessed September 15, 2005. Whether that divergence in ratifications will pose any problem in implementing the reform package is unclear. It has been argued that "the Agreement unambiguously changes Part XI in a legally binding manner." John F. Turner, assistant secretary of state for oceans and international environmental and scientific affairs, Testimony before the Senate Environment and Public Works Committee, Hearing on Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention, March 23, 2004, www.state.gov/g/oes/rls/rm/2004/30723.htm.

12. Quoted in Steven Greenhouse, "U.S., Having Won Changes, Is Set to Sign Law of the Sea," *New*

York Times, July 1, 1994, p. A1.

13. William H. Taft IV, Testimony before the Senate Foreign Relations Committee, Hearing on Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention, October 21, 2003, p. 8, <http://www.state.gov/g/oes/rls/rm/2003/25573.htm>.

14. Turner, Testimony before the Senate Environment and Public Works Committee.

15. George Galdorisi, "Ratify the Law of the Sea Treaty," *San Diego Union-Tribune*, December 14, 2004, p. B7. "The agreement addresses in full all concerns identified by President Reagan a decade ago." See also David B. Sandalow, "Law of the Sea Convention: Should the U.S. Join?" Brookings Institution Policy Brief no. 137, August 2004, p. 7.

16. Friedman and Friedman, p. 2. Indeed, this argument is made by almost every treaty backer. See, e.g., John Norton Moore, Testimony before the Senate Foreign Relations Committee, Hearing on Accession to the United Nations Convention on the Law of the Sea and Ratification of the 1994 Agreement Regarding Part XI of the Convention, October 14, 2003, p. 5, <http://www.foreign.senate.gov/testimony/2003/MooreTestimony031014.pdf>; and Ted Stevens, Statement on the UN Convention of the Law of the Sea to the Senate Foreign Relations Committee, Hearing on Accession to the United Nations Convention on the Law of the Sea and Ratification of the 1994 Agreement Regarding Part XI of the Convention, October 14, 2003, p. 3, <http://www.foreign.senate.gov/testimony/2003/StevensTestimony031014.pdf>.

17. "The U.S. Proposals for Amendments to the Draft Convention on the Law of the Sea," U.S. delegation to the Third United Nations Conference on the Law of the Sea working paper, undated, in author's possession.

18. State Department, "Oceans Policy and the Law of the Sea Convention," undated memorandum, p. 6, in author's possession.

19. The changes to the agreement are described in United Nations General Assembly, "Law of the Sea: Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Report of the Secretary General," A/48/950, June 9, 1994, <http://daccessdds.un.org/doc/UNDOC/GEN/N94/244/82/PDF/N9424482.pdf?OpenElement>.

20. Office of Legal Affairs, International Seabed Authority, "Selected Decisions and Documents of

the Eighth Session," 2002, p. 30.

21. *Ibid.*, p. 12.

22. Office of Legal Affairs, International Seabed Authority, "Selected Decisions and Documents of the Ninth Session," 2003, pp. 2–3.

23. *Ibid.*, p. 4.

24. *Ibid.*, p. 24.

25. "Law of the Sea: Consultations of the Secretary-General," sec. 8, para. 1(a)-(b), pp. 28–29.

26. *Ibid.*, sec. 7, para. 1(a), p. 28.

27. United Nations, "The Law of the Sea: United Nations Convention on the Law of the Sea," 1983, Article 160, 2(f)(i), p. 83, http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Hereinafter cited as Law of the Sea Treaty.

28. International Seabed Authority, "Seabed Council Ends Session after Agreeing to Tap Nonbudget Funds for Travel of Some Members of Its Expert Bodies," news release, SB/9/10, August 5, 2003, p. 1.

29. International Tribunal for the Law of the Sea, "Statute of the International Tribunal for the Law of the Sea," Article 3, http://www.itlos.org/documents_publications/documents/statute_en.pdf.

30. "Law of the Sea: Consultations of the Secretary-General," sec. 3, para. 15(d), p. 25. 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 geographical distribution of seats in the Council." *Ibid.*, sec. 3, para. 15(d)-(e), p. 25.

31. Law of the Sea Treaty, Article 150 (h), p. 75.

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33. 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.

34. David A. Colson, "UN Convention on the Law of the Sea," *U.S. Department of State Dispatch* 5, no. 22 (March 30, 1994): 361.

35. "Law of the Sea: Consultations of the Secretary-General," sec. 1, para. 2, p. 16.

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37. Yakov Ostrovsky, Statement before the 48th Session of the United Nations General Assembly, July 28, 1994, pp. 1–3.
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50. Pardo, p. 17.
51. Quoted in Leitner, “A Bad Treaty Returns,” p. 144.
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62. Friedman and Friedman, p. 3.
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64. Richard Lugar, “Lugar Statement on Law of the Sea Treaty,” Statement at committee mark-up of a resolution of advice and consent to the UN Convention on the Law of the Sea, p. 1, Senate Foreign Relations Committee, February 11, 2004.
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