



Entrepreneurship Analysis

The Law of the Sea Treaty Impeding American Entrepreneurship and Investment

By Doug Bandow

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Executive Summary

The genesis of the Law of the Sea Treaty (LOST), widely known as the “constitution of the oceans,” runs back more than 60 years. The negotiations were captured by Third World states in the 1970s, leading President Ronald Reagan to reject the treaty in 1982 as contrary to American interests.

The Clinton Administration revived the treaty, which led to some countries in Europe and elsewhere to put the treaty into effect. America signed, but opposition in the Republican-controlled Senate prevented ratification. Now President George W. Bush and the Senate Democratic majority are pushing the treaty forward. Despite the broad support now accorded to the LOST, ratification would not be in America’s interest. And any purported benefits would be negligible. Its best provisions, covering exclusive economic zones and navigational freedom, for instance, largely codify existing international law.

Moreover, in the case of a foreign challenge, the LOST would offer little benefit. U.S. naval vessels, not international paper guarantees, would ensure American ocean passage.

The treaty’s worst provisions, those creating the seabed regulatory regime, are very bad indeed. Despite the oft-repeated claim that the 1994 Clinton accord “fixed” the treaty, LOST remains true to its radical origins. Although some of the treaty’s worst provisions have been modified, it still establishes a bizarre regulatory regime to govern seabed mining—which would be antagonistic to commerce, exploration, and investment.

The LOST treats the ocean’s unowned seabed resources as property of the United Nations (U.N.). It essentially creates a second U.N.—the International Seabed Authority, ruled by an Assembly and a Council—to govern deep seabed mining and redistribute income from the industrialized West to developing countries. The Enterprise would mine the ocean floor, with the coerced assistance of Western mining companies, on behalf of the Authority. The system is unique in its byzantine perversity.

As such, the LOST would discourage future minerals production as well as punish entrepreneurship in related fields involving technology, software, and other processes with an ocean application. Ratifying the treaty, a disastrous throwback to the era when socialism was seen as the wave of the future, would be especially foolish today, in a world of exploding economic opportunities and technological possibilities. A LOST-like regime also would discourage exploration of other, currently unowned resources, most notably space.

International cooperation to develop the ocean floor can best occur outside of an international bureaucracy. A treaty among nations with a vested interest—those likely to be affected—would enable

development to proceed. As for the LOST, the seabed provisions should be severed from sections governing navigational freedoms and resource management, which should be considered separately.

A law of the sea treaty could advance international cooperation in a number of maritime issues and be worth ratifying. The Law of the Sea Treaty offers some benefits, but the costs of the omnibus measure are too high. At risk is an open international economic environment inviting to entrepreneurs. The U.S. should not ratify the LOST.

Introduction

The genesis of the Law of the Sea Treaty (LOST) runs back more than 60 years. Various ideological interests have long pushed for a “constitution of the oceans” to prevent alleged dangers on the high seas. The LOST has won support from environmentalists, U.S. Navy officers, and even some business interests. In fact, much of the Republican Party establishment, including President George W. Bush, now advocates ratification of the same essential treaty—with some modest improvements dating from 1994—that President Ronald Reagan wisely rejected 25 years ago.

The LOST almost certainly would have been concluded in 1981 had President Jimmy Carter won reelection. But Reagan viewed the treaty as contrary to American interests and refused to sign it. Although a majority of nations affixed their signatures in 1982, most failed to ratify it, and the LOST languished for more than a decade. (Even the Soviet Union offered only rhetorical support for the treaty, which had been drafted to satisfy the United Nations developing nations caucus called the “Group of 77.”)

No obvious problems resulted from the lack of the so-called U.N. ocean “constitution,” but the administration of George H.W. Bush initiated international discussions to put forth an amended treaty, and the Clinton Administration followed with a concerted push to revive it. The result was a separate agreement amending the seabed mining articles (Part XI), to be applied along with the LOST. The Europeans and other leading states quickly ratified the treaty package, putting it into effect. America signed, but opposition in the Republican-controlled Senate, led by Foreign Relations Committee Chairman Jesse Helms (R-N.C.) prevented ratification.

However, Helms’s successor, Richard Lugar (R-Ind.) won committee approval and the otherwise unilateralist-minded President Bush added his endorsement. The treaty is similarly supported by Sen. Joseph Biden (D-Del.), who replaced Lugar as committee chairman after the Democratic takeover, and by virtually all congressional Democrats. (Biden is running for president, but as a long shot in that race, is considered a possible Secretary of State in a future Democratic administration.)

Treaty advocates argue that the original document’s flaws have been “fixed,” and that new problems like terrorism and the alleged threat of rising sea levels from global warming make ratification even more urgent. According to author George Galdorisi, who writes extensively on national security issues, the convention represents “a rule of law that the

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United States must promote and sustain if it is to succeed in endeavors such as the global war on terrorism.”¹

Despite the LOST's newfound support, ratification would still not be in America's interest. It remains a compromise requiring the sacrifice of some U.S. interests. For instance, the boundary-setting process strips some non-seabed resources away from the United States. The pollution provisions restrict America's ability to control some emission sources.

Moreover, at a time when U.S. consumers are struggling with the rising costs of gasoline, the U.S. would eventually have to share oil revenues from development of the Outer Continental Shelf (OCS) beyond 200 nautical miles—roughly 14 percent of the OCS. The royalty rate under Article 82 of the Treaty hits 7 percent by the 12th year of production; the proceeds from U.S. oil exploration would be distributed by the International Seabed Authority to its member states—namely, the Third World majority.

The treaty's best provisions—covering navigation, for instance—largely codify existing international law. Its worst provisions—those creating the seabed regulatory regime—would discourage future minerals production as well as punish entrepreneurship in related fields involving technology, software, and intellectual property that have an ocean application.

In its latter application, the treaty is a disastrous throwback to the era when socialism was seen as the wave of the future. Ratifying it would be even more foolish today, in a world of exploding economic opportunities and technological possibilities.

The Problem

The Law of the Sea Treaty has always been a complicated document covering seabed mining, navigation, fishing, ocean pollution, marine research, and individual countries' exclusive economic zones (EEZs). Most of these sections offer modest positives, but the most important provisions—navigation and EEZs—largely codify customary international law. Precisely how much the U.S. would benefit in these areas from adhering to the treaty is unclear, though America has faced no obvious problems from remaining outside of the convention over the last decade. Moreover, irrespective of any treaty text, only the U.S. Navy can guarantee free ocean transit in situations where nations have both the incentive and ability to interfere.

The primary stumbling block to ratification is the bizarre regulatory regime governing seabed mining of deep ocean resources like the minerals cobalt and manganese. This system is unique in its byzantine complexity. The treaty effectively treats the ocean's unowned seabed resources as property of the United Nations. The LOST established an International Seabed Authority (ISA), ruled by an Assembly and a Council, to govern deep seabed mining and redistribute income from the industrialized West to developing countries. Perhaps inspired by "Star Trek," the LOST also created an entity called the Enterprise, which would mine the ocean floor—with the coerced assistance of Western mining companies—on behalf of the Authority.

The convention explicitly limited resource development and promised to protect developing countries from the lower prices that would result from minerals production. Essentially, it authorized an OPEC-style commodity cartel.

The details spelled out were as bad as the principles. Private companies had to survey two sites and turn one over *gratis* to the Enterprise; they also were required to transfer technology to the Enterprise and to developing states. American miners would be targeted by anti-density and antimonopoly provisions, while developing nations would dominate the Authority. Western governments would be required to enforce payment of fees and royalties, subsidize the U.N.'s mining operation, and provide resources for redistribution to Third World governments and pseudo-national entities like the Palestinian Liberation Organization (now the Palestinian Authority).

The problems with such a system are numerous. It would empower an inefficient international organization and incompetent—often kleptocratic—Third World governments, setting poor precedents for the development and operation of other multilateral institutions. Establishing a global oceans regulatory system that restricts entrepreneurship would do more than hinder resource development on the seabed; it would deter the production of software, technology, and processes designed for seabed mining or with dual-use capabilities. Finally, a LOST-like regime would discourage exploration of other currently unowned resources, most notably space. Although the treaty's economic impact might have seemed limited, its future adverse effects always would have been enormous. Today, they could be even worse.

Bad Rules Persist

There never was any need to tie seabed mining to navigation, exclusive economics zones, and the other maritime provisions. Doing so enabled the Group of 77 to demand a payoff for accepting maritime freedoms that were already widely accepted. Seabed mining requires no international bureaucracy, but simply a system for recording seabed claims and resolving conflicts. The environmental impact of mining can be addressed through a separate convention among states whose citizens or companies participate in mining.

When the seabed mining bubble burst, the Law of the Sea Treaty's plan for a large regulatory bureaucracy became even more ludicrous. Trillions of dollars in undersea riches once danced in the imaginations of Third World politicians, but alas, it was not to be. Land-based supplies remained abundant and the costs of raising manganese nodules, sulphides, and other seabed mineral deposits to the surface remained prohibitive. The industry withered away because there was no demand, not, as some advocates say, because there was no LOST.

If there were to be a mining treaty—a dubious proposition to begin with—then the proper fix” would be to junk Part XI, severing seabed mining from the rest of the treaty. Interested countries could have negotiated a simpler mining regime or established informal arrangements to coordinate their activities.

Unfortunately, President Ronald Reagan's successors took the treaty as a given, and have attempted to ameliorate its most onerous provisions without questioning its necessity. In 1994, American U.N. Ambassador Madeleine Albright declared victory. The revised text, she argued, provided “for the application of free market principles to the development of the deep seabed” and established “a lean institution that is both flexible, and efficient.”² Other Clinton Administration officials made similar claims. “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.”³

These arguments were adopted by the administration of George W. Bush and other treaty backers. For instance, in 2003, State Department Legal Adviser William H. Taft IV testified 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.”⁴ John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, agreed: “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.”⁵ If these contentions were true, why not ratify the accord? Because they are flat wrong.

Changes Range from “Less Bad” to Worse

Most of the policy makers claiming that Part XI has been “fixed” seem not to have read either the original or the revised provisions. Despite the renegotiation, the Law of the Sea Treaty retains a collectivist worldview. The State Department acknowledges that the 1994 “Agreement retains the institutional outlines of Part XI”⁶—that is, only some of the details have changed; the structure and underlying principles remain the same.

For instance, all of the original regulatory bodies survive: the International Seabed Authority, Assembly, Council, multiple commissions, Enterprise, and more. The “parallel system,” whereby Western miners subsidize the Enterprise, persists. So does financial redistribution to Third World governments. Seabed mining remains subject to the perverse political dynamics typical of multilateral organizations. Under the LOST, taxpayers in industrialized countries will pay for the privilege of being regulated by a Third World-dominated body.

Private firms must continue to survey and provide free sites for the Enterprise. The treaty encourages public cartels yet discriminates against feared domination by American mining firms.

ISA fees have been lowered, but remain substantial. Section 8, Paragraph 1 of the revised text declares that the payment system is to be “fair both to the contractor and to the Authority”—a hopelessly vague provision open to all sorts of perverse interpretations.

The treaty also offers land-based mining interests protection against competition from seabed mining. It stipulates that fees “shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals.” Because seabed mining is more expensive and riskier than land-based mining, this could force seabed producers to sell minerals at a loss. But that’s not all.

Section 7, paragraph 1 of the updated LOST establishes a new “economic assistance fund” to aid land-based minerals producers. Surplus

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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.”⁷ Theoretically, America could block inappropriate payments—at least so long as it remains a member of the Finance Committee—but the LOST regime would be so politicized that a “no” vote may have to be traded away some day to win other battles.

In fact, the ISA already has pursued limited redistribution during its short life. It has established voluntary trust funds to aid developing countries, but since few members have contributed, the Authority has had to step in with general funds.

The new 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.⁸ In its early days the Tribunal served as a dumping ground for frustrated LOST politicians such as Cameroon’s Paul Engo and Tanzania’s Joseph Warioba, both of whom once had hoped to become the Authority’s Secretary-General.

Many of the specific “fixes,” such as to the voting system, are inadequate. According to the revised treaty, the United States would be guaranteed a seat on the Council but no veto. The Council would consist of four chambers, any one of which could block action if a majority of its members voted no. Although the U.S. might be able to round up the necessary votes to form a majority in its chamber, it could not prevent other nations from blocking required ISA business in the other chambers on such matters as approval of rules for mining applications.

Land-based mineral producers oppose the very idea of seabed mining. Yet under Section 3, paragraph 15 of the revised text, 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. Thus, the voting power of such groups essentially matches that of America. And when issues are to be decided by “consensus,” other countries’ opinions could easily swamp U.S. concerns.

Thus, other governments would have the opportunity to extract potentially expensive concessions from the U.S.—such as new limits on production or additional redistributionist payments—just to let the ISA function. If the Authority were to assert jurisdiction over seabed mining,

companies to invest billions in undersea operations, and global markets to develop for ocean production, such a deadlock would most harm the U.S. and other industrialized states.

Voting in the ISA so far gives no reason for optimism. Electing members to the dominant Council has proven to be no easy task, with substantial disagreement over membership criteria and political horse-trading.⁹ For instance, in 1996 there were 22 candidates for 15 seats on the Legal and Technical Commission. But the Council, rather than select from this pool, simply expanded the membership to 22. Five years later there were 24 candidates in the election, so the Council again increased the size of the panel. During the 2004 election for ISA Secretary-General, substantial pressure was applied to the three candidates who were apparently trailing to withdraw to avoid having a contested election.¹⁰

The revised treaty retains the ISA's ability to impose production controls. Negotiators excised provisions that set a convoluted ceiling on seabed production, but they preserved 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."

Nor is there any obvious limit to America's potential fiscal liability. Naturally, the U.S. is expected to provide the largest share of the ISA's budget, starting at 25 percent. 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"¹¹—and then approved by the Assembly and Council.

Authority spending has been modest to date, but the deep-pocketed Uncle Sam is not yet a member. The Clinton Administration complimented itself for the inclusion of Section 1, paragraph 3, pledging that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective." Similarly, according to Section 5, paragraph 1(c) stipulates that the royalty "system should not be complicated and should not impose major administrative costs on the Authority or on a contractor."

Alas, this does nothing to change the perverse incentives that bias most international organizations towards extravagance. Moreover, there appears to be little doubt that the U.S. will be expected to contribute ever

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more. As of June 2005, 37 ISA members were in at least two years arrears on their dues. The ISA was reduced to pleading members to pay their dues and urging wealthier states to make voluntary contributions to the organization.¹² If the U.S. joins, it will possess the deepest pocket of all to be picked.

Technology Transfer and Intellectual Property

Another failed fix involves technology transfer. Section 5, paragraph 1(b) of the revised text replaces the mandatory technology transfer requirement with a duty of sponsoring states to facilitate the acquisition of mining technology “if the Enterprise or developing States are unable to obtain” equipment commercially. 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 a government restricted the sale of technology with sensitive 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, are therefore responsible for mandating and subsidizing the Enterprise’s acquisition of technology.

Moreover, the amended agreement leaves intact a separate, open-ended mandate for coerced collaboration. Article 144 stipulates:

[T]he Authority and States Parties 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

(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.

Leaving the ISA with an ambiguous but seemingly expansive grant of authority risks allowing it to indirectly resurrect the provisions dropped in order to entice the U.S. to ratify the LOST. The ultimate impact could be unpredictable. For instance, some defense analysts worry that China

has used its status as a potential miner to win U.S. government approval for undersea mining technology purchases that have security as well as resource development uses.¹³ Government vetting of such purchases is difficult enough now, but the LOST could do away with that sensitive technology protection altogether.

Costs to Entrepreneurs

The treaty has become a solution in search of a problem. A good international treaty might be useful, but it is not necessary. Admittedly, seabed mining seems a distant prospect. Even ISA officials acknowledge that predictions that mining would begin by 1985 were wildly over-optimistic. They now have no idea when the resources they purport to regulate might actually be worth harvesting.

Nevertheless, operations might eventually become economically feasible as technologies evolve and market conditions change. Seabed mining is in some senses a distant cousin of the undersea oil exploration that is already occurring in shallower ocean waters. But such developments are unlikely to go on with the Law of the Sea Treaty in its current form, and it may even threaten innovations to harvest resources such as oil from deeper ocean sources. As noted previously, the LOST requires sharing the revenues of oil drawn from the Outer Continental Shelf from 200 or more nautical miles beyond U.S. shores. Seven percent of revenues is a significant levy, heavy enough to discourage more costly or risky exploration and production.

Today, it is hard to imagine any entrepreneur investing capital sufficient to create a viable deep seabed mining operation. The underwater environment is forbidding, in ways potentially as challenging as space. The great depths, incredible pressure, and uneven seabed make the creation of a workable, let alone an economical, mining operation extremely difficult. But absent intrusive regulation, entrepreneurs have accomplished the seemingly impossible before.

Losing access to the ocean floor's plentiful resources could be costly, especially in the future as land-based supplies wane. Equally significant would be the cost of discouraging development of technologies to explore and develop the seabed: mining processes, production vessels, undersea equipment, sonic and mapping systems, ocean worthy cables, communications equipment, software, and much more.

Some of these would have little use beyond seabed mining. But

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others would yield spin-off benefits or themselves have dual uses. It is hard to predict the ultimate cost since the loss would not be of existing, developed technologies, but of future, potential ones. We cannot see the lost technological breakthroughs, which would allow us to better explore the oceans, travel at great depths, communicate in a difficult medium, connect the ocean floor to the ocean surface, and perhaps ultimately more efficiently travel in space.

Even if no minerals are ever lifted commercially from the ocean floor, the Law of the Sea Treaty retains its coercive, collectivist philosophical underpinnings. It will have a negative impact on entrepreneurship even if no mining ever occurs. The worst principle is the declaration that all seabed resources are mankind’s “common heritage” under the control of a majority of the world’s nation states. American ratification would help validate some of these discredited collectivist notions.

Among the precedents enshrined by the LOST is that the nation states—not peoples—of the world, in the words of former Malaysian Prime Minister Mahathir Min Mohamad, collectively own “all the unclaimed wealth of this Earth.”¹⁴ Granting ownership and control to Third World autocracies with no relationship to the resource nor any ability to contribute anything to their development makes neither moral nor practical sense.

A Better Alternative for the Sea: Property Rights

Much better on both counts is the simple principle articulated by the great 17th century English natural rights philosopher John Locke, that mixing one’s labor with resources—for instance, by developing complex machinery capable of scouring the ocean floor—creates a property interest in them.

The Lockean standard would better suit the interests of developing countries. The Law of the Sea Treaty may purport to promote international justice, fairness, and cooperation, but, in fact, it advances none of these. Rather, it raises to the status of international law dubious claims of ownership to be secured through an oligarchy of international bureaucrats, diplomats, and lawyers. It also mandates global redistribution of resources and technology, creates a monopolistic public mining entity, and restricts competition—just the sort of statist panaceas that were discredited by the collapse of Soviet communism.

As a dead letter, such a precedent might seem harmless. However, as noted earlier, seabed mining might some day become a viable venture,

so long as it is not subject to a prohibitively restrictive and uncertain regulatory system like that established by the LOST. Far from being a market-oriented system, as claimed by some conservatives who have been co-opted by the Bush Administration, the treaty will forever discourage widespread exploration and production.

Moreover, the LOST could set a bad regulatory precedent for the commercial development of space. The U.N.'s Moon Treaty, which is technically in force, mimics the LOST's common heritage rhetoric, but establishes no institutional regulatory framework. Subjecting private space exploration and development to a LOST-like system would discourage private ventures.

With the only economically viable private space operations limited to launching satellites, the impact of an intergalactic LOST might seem slight. Nevertheless, serious entrepreneurs are entering the industry.¹⁵ Making a profit while exploring space is a daunting enough prospect. Attempting to do so when subject to an aggressive regulatory agency likely would be impossible. Mankind would lose not only new technologies, but the very possibility of reaching the heavens.

Many of LOST's costs are obvious, and reason enough to reject the treaty. But the agreement's potentially greatest costs are unknown today. By punishing entrepreneurship directed at transforming the great frontiers of the oceans and space, LOST threatens potentially enormous losses well into the future. The exact impact of the regulatory regime might be unpredictable, since the treaty's exact operation is not certain. But the magnitude of the loss would be enormous.

Countervailing Benefits?

Throughout the treaty's development some observers have acknowledged its failings, but nevertheless 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."¹⁶

Supporters gave special focus to the navigation provisions. For instance, Rear Adm. William Schachte, Jr. (Ret.), who backed the LOST during the Reagan years, has argued that the document is vital to guarantee American naval rights. Indeed, President Reagan's refusal to sign the LOST left some critics predicting chaos and combat on the high seas two

decades ago. Yet we have witnessed not one incident as a result of the failure to implement the LOST.

However, not all LOST supporters share Adm. Schachte's expansive view of America's navigation rights. Convention Article 310 allows nations to make restrictive declarations or statements upon ratification, and many have done so. Among the issues covered are innocent passage of warships, the transit of nuclear-powered ships or those carrying nuclear weapons, military maneuvers, and threats of force against maritime areas of signatory states.¹⁷

The U.S. could ignore any reservations contrary to its interpretation, but doing so undercuts the argument that joining the LOST offers greater security for navigation rights. With or without the treaty, Washington will have to rely upon diplomatic acumen and military power to ensure free transit around the globe.

Finally, the LOST may encourage the United Nations to venture into new, unexplored territory. Although the New International Economic Order, of which the LOST was a significant part, has disappeared from United Nations discourse, its spirit continues to animate treaty supporters. For instance, during the official 20th anniversary celebration of the LOST's signing, Armenian U.N. Ambassador Movses Abelian suggested an enhanced regulatory role of undetermined scope by the U.N. and related agencies. "With the entry into force of the Convention, the Secretary-General has assumed the role of overseeing developments relating to the Convention, the law of the sea and ocean affairs in general," he said.¹⁸

The environment is another issue of interest. University of Miami law professor Bernard H. Oxman, a long-time LOST advocate, argues that, "The Convention is one of the rare treaties to articulate a basic environmental norm in unqualified form."¹⁹ There is nothing intrinsically wrong with articulating environmental norms—if they are justified, are qualified to account for competing interests, and are in accordance with each participant country's governing institutions. But that is unlikely to emerge from a highly political process like the LOST negotiations.

Indeed, the Treaty risks endorsing some very bad environmental policy approaches. For example, South African Ambassador Sandile Nogxina, speaking on behalf of the African Group to celebrate the 10th anniversary of the LOST system, declared that, "The concept of sustainable development is a principle which the African group embraces."²⁰ At the same ceremony, South Korea's Jung Hai-ung,

representing the Asian group, opined “that the precautionary approach set out in Agenda 21, chapter 17, should be applied to the seabed activities.”²¹ The Netherlands formally pushed the Council “to apply a precautionary approach to seabed exploration.”²²

All of these terms incorporate much larger political agendas. Biasing the process against development globally would have profound impacts on all peoples, and especially those in the poorest lands who most need the results of economic growth, international investment and trade, and globalization. Serious application of the precautionary principle would halt economic development, since it is impossible to prove a negative—that a new process or technology involves no risk. Trade-offs are inherent to any economic endeavor, with a thoughtful balancing of potential costs and benefits.

As if this weren’t a broad enough agenda for U.N. regulators, the ISA sees an opportunity to do more. In 2004 it proclaimed:

The Authority represents a unique experiment in international relations. It is the only international body with the responsibility of administering a global commons for the benefit of mankind. As a global body with an institutional structure and finely balanced decision-making mechanism that safeguards the interests of all States, the Authority is well equipped to deal with new developments relating to the deep ocean and to play a more meaningful role in the international system of ocean governance.²³

The U.N.’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.”²⁴

Such regulatory activism would inhibit entrepreneurship. Investors seek legal stability and flee political uncertainty. A secure economic environment would be particularly important for entrepreneurs entering high-risk investment fields, notably underwater and in space, where the viability of the very process, let alone the security of the expected profit, would be in doubt. And with entrepreneurship in jeopardy, the future of the world’s poor would also be at risk, as the economic development that could allow them to exit poverty is eroded.

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Contrary to the claims of treaty supporters, the 1994 revisions did not “fix” the agreement. The LOST remains captive to its collectivist and redistributionist origins, establishing an unjust and unworkable seabed mining regime.

Conclusion

A law of the sea treaty could advance international cooperation in a number of maritime issues and be worth ratifying, but the existing Law of the Sea Treaty’s proffered benefits are far outweighed by its costs.

Contrary to the claims of treaty supporters, the 1994 revisions did not “fix” the agreement. The LOST remains captive to its collectivist and redistributionist origins, establishing an unjust and unworkable seabed mining regime. Moreover, the treaty sets undesirable precedents that would have long-lasting impacts in other areas. At risk would be a free international political environment and an open economic system inviting to entrepreneurs. Much has changed since the 1980s, but the “new” LOST remains mired in the redistributionist international politics of the past. Following Reagan’s lead, The U.S. should once again just tell LOST to get lost.

Notes

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2. Ambassador Madeleine Albright, Statement to the 48th Session of the United Nations General Assembly, July 27, 1994, p. 2.
3. Quoted in Steven Greenhouse, "U.S., Having Won Changes, Is Set to Sign Law of the Sea," *The New York Times*, July 1, 1994, p. A1.
4. William H. Taft IV, Testimony before the Senate Committee on Foreign Relations, 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.
5. John F. Turner, 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, p. 8.
6. "Oceans Policy and the Law of the Sea Convention," undated State Department memorandum, p. 6.
7. Article 160, 2(f)(i)
8. Article 3, Statute of the International Tribunal for the Law of the Sea.
9. *Selected Decisions and Documents of the Tenth Session* (Kingston, Jamaica: International Seabed Authority, 2004) p. 16.
10. *Proceedings of the Tenth Anniversary Commemoration of the Establishment of the International Seabed Authority* (Kingston, Jamaica: International Seabed Authority, 2004), pp. 46-48; *Selected Decisions and Documents of the Tenth Session*, p. 18.
11. Section 9, paragraph 3
12. *Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea*, International Seabed Authority, ISBA/11/A/4 and Corr.1, July 13, 2005, p. 18.
13. Peter M. Leitner, "A Bad Treaty Returns: The Case of the Law of the Sea Treaty," *World Affairs* Vol. 160, No. 3 (Winter 1998), p. 144; Peter M. Leitner, 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, p. 2.
14. Statement to the U.N. General Assembly, 1982.
15. See, e.g., Katherine Mangu-Ward, "Space Travel for Fun and Profit," *Reason*, January 2007, pp. 39-47.
16. Letter from Clifton E. Curtis et al., Center for Law and Social Policy, to James L. Malone, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, July 30, 1981.
17. "Declarations and Statements," United Nations Division for Ocean Affairs and the Law of the Sea, January 31, 2006, www.un.org/depts/los/convention_agreements/convention_declarations.htm.
18. *Proceedings of the Twentieth Anniversary Commemoration*, p. 25.
19. *Ibid.*, p. 200.
20. *Proceedings of the Tenth Anniversary Commemoration*, p. 29.
21. *Ibid.*, p. 31.
22. *Selected Decisions and Documents of the Tenth Session*, p. 33.
23. *Ibid.*, p. 46.
24. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, "The Oceans Are the Very Foundation of Human Life ...," undated, http://www.un.org/Depts/los/oceans_foundation.htm.

About the Author

Doug Bandow is the Bastiat Scholar in Free Enterprise at the Competitive Enterprise Institute and Vice President of Policy for Citizen Outreach, a Washington, D.C.-based grassroots political organization.

He was formerly a Senior Fellow at the Cato Institute, nationally syndicated columnist with Copley News Service, and editor of the monthly political magazine *Inquiry*. Before that he served as a Special Assistant to President Ronald Reagan and as a Senior Policy Analyst in the 1980 Reagan for President campaign. While serving as a Special Assistant to President Reagan, he was a Deputy Representative to the Third United Nations Conference on the Law of the Sea.

He has been widely published in such periodicals as *Time*, *Newsweek*, *Fortune*, *Christianity Today*, *Foreign Policy*, *Harper's*, *National Interest*, *National Review*, *New Republic*, and leading newspapers including the *New York Times*, *Wall Street Journal*, and *Washington Post*. Bandow has written and edited several books, including *Foreign Follies: America's New Global Empire* (Xulon Press, 2006); and *The Korean Conundrum: America's Troubled Relations with North and South Korea* (Palgrave/Macmillan, coauthor).

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The Center for Entrepreneurship was formed by the Competitive Enterprise Institute in 2006 to specifically look at the areas of public policy entrepreneurs face when starting or building their businesses. If unnecessary rules prevent businessmen and women from launching their innovations, no other regulations matter.

The Center starts out with one question: If entrepreneurs such as Bill Gates, Sam Walton, or eBay's Meg Whitman were starting out today, what would be the barriers to them raising capital to get their ideas off the ground and keep their businesses growing?

The Center looks at the increasingly burdensome mandates in the area of securities law, such as Sarbanes-Oxley and accounting rules. It will also study innovations in financial markets to capital formation for small businesses, and whether public policy is hindering those innovations

John Berlau is Director of the Center for Entrepreneurship.

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