



Issue Analysis

The Law of the Sea Treaty: A Bad Deal for America

by Jeremy Rabkin

June 1, 2006

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Executive Summary

The Third United Nations Convention on the Law of the Sea (UNCLOS III) was negotiated in the late 1970s, an era when Third World nations looked to the U.N. to distribute resources from rich to poor nations. President Reagan rejected American participation in the 1980s. Slight changes introduced in the 1990s persuaded the Clinton Administration to endorse the treaty. The Bush Administration, perhaps because it is eager to improve its internationalist credentials, has also endorsed the treaty. But it remains a bad deal for the United States.

The Law of the Sea treaty does not simply set rules for commercial activity beneath the high seas. It establishes a new international tribunal and new international bureaucracies to interpret and apply a wide range of rules for activities on the seas—and to proceed with such rules even against U.S. objections. It threatens to introduce international legal complications into national security missions of the U.S. Navy. It threatens to complicate not only deep-sea mining—if it ever becomes a realistic commercial prospect—but also fishing and other commercial activities at sea and perhaps even on adjacent lands. Above all, it sets a very bad precedent.

In the past, the United States has jealously guarded its national sovereignty. It has never agreed to treaties under which new standards can be imposed, without express U.S. consent, by the decision of international bureaucrats or by coalitions of hostile—and potentially hostile—nations. What the United States does do in many areas it should do in regards to this treaty—assert its rights under customary international law. The Law of the Sea treaty is not necessary to secure claims which the U.S. already makes on this basis (regarding economic rights in U.S. coastal waters and rights of passage elsewhere). It is a dangerous concession to international fashion to accept the idea that U.S. rights are dependent on the approval of shifting majorities of other nations.

Introduction

The law of the sea treaty now before the Senate—officially known as the Third United Nations Convention on the Law of the Sea (UNCLOS III)—is supposed to supersede two earlier U.N. conventions on the allocation of rights at sea, which were drafted in the 1950s and reflect the modest aims of international law in that era. By contrast, UNCLOS III was largely drafted in the late 1970s, a period in which the then-new Third World majority in the U.N. General Assembly sought to recast international law to impose vast transfers of wealth from affluent to less-developed nations.¹

President Ronald Reagan refused to sign UNCLOS III when it was finally completed in 1982. He particularly criticized provisions in the treaty establishing a complex scheme of international controls on deep seabed mining. Most Western European nations shared American concerns, so the treaty floundered on the sidelines of international diplomacy for more than a decade. But in the changed international environment of the 1990s, the Clinton Administration joined with some European governments to sponsor a supplementary agreement on deep seabed mining. The 1994 agreement modified some of the most objectionable provisions in the original treaty. Reassured by these adjustments, European nations proceeded to ratify UNCLOS III in the mid-1990s, starting with Germany, Italy, and Greece in 1995, with all other EU members states following over the next few years. When Sen. Jesse Helms was chairman of the Senate Foreign Relations Committee, he blocked consideration of UNCLOS. Following Helms's retirement in 2003, and with a renewed endorsement from the Bush Administration, the Senate Foreign Relations Committee voted unanimously to endorse UNCLOS III in 2004.

Yet even with the accommodations to new realities in the 1994 agreement, the law of the sea treaty remains a bad bargain for the United States. In its basic framework and underlying premises, it is a monument to the failed socialist thinking of a bygone era. Its ratification would enshrine this thinking in a prominent fixture of international law. Down the road, this might lead to the revival of unsound legal principles which ought to be firmly repudiated. In the meantime, it establishes a number of new institutions that are likely to cause considerable trouble. The treaty ought to be rejected, as it represents a threat to American sovereignty, national security, and economic interests.

Judicial Constraints on Naval Interventions

The United Nations did not invent the law of the sea. There has been a law of the sea in effect for many centuries. When Spanish and Portuguese explorers first charted new sea routes to the Americas and Asia, their governments imagined that they could lay claim to all the ocean vastness in between. Successful challenges by new maritime powers, especially Britain and Holland, soon established the principle that the high seas should be open to all. In the early 17th century, the Dutch jurist Hugo Grotius published an extremely learned treatise which summed up the new approach in a catchy phrase: “freedom of the seas.” To secure freedom on the seas, there had to be rules applicable to most situations that also acknowledged—and thereby constrained—necessary exceptions. These rules were developed over centuries in a process of mutual accommodation—and occasional challenge by war at sea—among major maritime powers. Nearly all of this law was “customary law,” meaning that it reflected actual practice among maritime states—including particular agreements among particular states—without being set down in any formal document.

The conventions of 1958 had somewhat more ambitious goals. They sought to secure general agreement on precisely defined rights of “innocent passage” through coastal waters, specifying a 12-mile limit on territorial claims at sea (where the national laws could be enforced by coastal states). They laid down rules for charting the seaward boundaries of coastal waters when the actual coastline has an irregular or interrupted pattern. Almost all nations ratified these conventions within a few years, though not all observed their terms. The treaties did not address some matters on which there remained important disagreements, such as the status of fishing and mining rights outside territorial waters. These issues might have been addressed in a third convention fashioned along similar lines as its predecessors. But instead, UNCLOS III set out on a very different premise—that what belongs to no one must belong to everyone.

Yet serious statesmen have never embraced this idea of a world authority on boundaries, empowered to make definite decisions on all disputed borders. This is partly because too many affected nations would not accept the decisions of such a world authority and other nations are not prepared to provide troops on an open-ended basis to back up such decisions—especially considering the conflicts that arise over border disputes.

Yet this is the idea at the core of the new law of the sea treaty. It sets out relatively precise rules about who can claim what as national waters, then establishes an international “Authority” to regulate the unclaimed areas under the high seas—and a new tribunal to resolve any and all disputes about these rules. Most risks posed by the “Authority” are somewhat hypothetical at present, because mining on the floor of the deep seas has not yet been attempted. But the tribunal presents immediate problems for the United States because the U.S. Navy is, right now, very much present on the high seas.

The United States is already committed, by its own policies, to abide by UNCLOS rules on transit rights and wants other nations to do so as well. The difficulties concern exceptions or the handling of exceptional circumstances. The question is, Who decides on the exceptional cases? The answer provided in UNCLOS III is a new international tribunal, most of whose judges—elected by the usual U.N. formulas to assure geographical and political “balance” —cannot be expected to have much sympathy for American concerns.

The law of the sea’s most pertinent rule is that no nation can interfere with the ships of other nations on the high seas. The UNCLOS treaty acknowledges exceptions, such as when a ship is suspected of involvement in “piracy” or in the “slave trade” or falsely flying the flag of the intervening state.² But UNCLOS’ acknowledgement of these exceptions is superfluous in these cases because interventions on these grounds were already well established in the early 19th century, when these evils were of major concern to naval powers. Meanwhile, UNCLOS makes no provision for contemporary concerns. In particular, it makes no provision for intervention against ships operated by terrorists or ships transporting weapons of mass destruction to rogue states.

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Terrorists have obvious reasons to take their operations out to sea. An attack on an oil tanker, for example, could do vast environmental damage and have a sizable impact on international oil markets. Seaborne shipping may be used to transport missiles and other weapons components not easily sneaked through airports. Currently, the United States does not claim the right to stop any and all ships on the high seas, merely on general suspicion. Since 2004, the United States has encouraged other nations, under the American-led Security Proliferation Initiative (SPI), to sign agreements authorizing American naval patrols to inspect merchant ships flying their flags when there is reason to fear the ships are engaged in illicit activities. While more than half the ships engaged in international commerce are covered by these agreements, many are not. American policy implicitly acknowledges that stopping other ships on the high seas would usually be improper. But special circumstances might justify exceptional measures.

UNCLOS III provides that, if a ship or its crew are seized on the high seas, the flag state can appeal to the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany, for a prompt decision on the legality of the seizure.³ The treaty allows states to opt for other forms of arbitration on other disputes, but other forms of arbitration require all nations involved to agree on a specific panel of arbitrators. The only important category of dispute where one party can force another to answer before ITLOS is when a ship has been detained on the high seas and the complaining party seeks its immediate release.

Seizing a ship on the high seas without the consent of its home government would inevitably trigger a diplomatic confrontation. But in the right circumstances, the United States or its allies might feel obliged to act first and try to handle the diplomatic protests later. If intelligence gives reasonably firm indications of

an imminent terror attack to be launched from a particular ship, the U.S. could insist on intervening, claiming a right of self-defense that supersedes the general “rules of the road” at sea. Alternatively, the United States might claim that a ship operated by terrorists was so closely analogous to a pirate ship that intervention could be justified under the UNCLOS exemption for piracy. In still another variant, the United States might interpret a bilateral agreement with the flag state as covering a particular intervention, while the flag state insisted on a different interpretation. In any of these cases, the flag state would likely sit on the sidelines while the ship’s operators pursued a claim on their own initiative, “on behalf of the flag State,” as UNCLOS allows.⁴ It is easy to imagine situations in which U.S. intervention might trigger a complaint to ITLOS. It is hard to imagine situations in which ITLOS would be other than a complicating factor in ensuing U.S. diplomacy toward the flag state.

Nor is there much consolation in the prospect of appealing to ITLOS against the seizure of an American ship, since the most vulnerable American ships would be small craft, gathering intelligence near the coasts of unfriendly states. UNCLOS couples transit rights with provisions for national regulatory measures in coastal waters, including the right of the coastal state to prohibit intelligence gathering in these waters. Suppose an American ship were seized outside the territorial waters of a hostile state, on the claim that it had earlier traversed these waters for illicit purposes and then been pursued into “contiguous” waters—as UNCLOS allows, for a belt of water extending twelve nautical miles beyond the twelve mile reach of “territorial waters.”⁵ The United States being required to document for ITLOS exactly what its ship was doing in exactly which waters could very well compromise sensitive U.S. intelligence gathering operations.

It is not even clear that the United States would benefit from having the option to pursue its own claims. In a direct confrontation over a seizure, the United States has considerable resources—naval, diplomatic, and economic—to unilaterally pursue its demands for immediate release. But having subscribed to UNCLOS, the United States would have much more difficulty wielding such pressures, if the state which effected the seizure insisted that the matter should be taken to ITLOS for resolution.

UNCLOS seems to provide protection against these concerns by stipulating that states may opt out of its compulsory arbitration requirements when disputes concern “military activities...by government vessels and aircraft engaged in non-commercial service.”⁶ At its narrowest reading, this provision might mean only that ITLOS will avoid intervening in full-scale confrontations between opposing battle fleets—a situation that would create problems far beyond those of dispute resolution. At its broadest, this exemption might mean that any seizure could be excluded from ITLOS review, since seizures are never effectuated by unarmed commercial vessels, which would entirely negate the provision bestowing mandatory jurisdiction on ITLOS for seizures at sea. So which is it?

The only thing certain is that it will be up to ITLOS to decide how far it wants to intrude into U.S. naval strategy. The State Department has proposed ratification with an “understanding” that the military exemption will be read broadly. (Sec. 2, Par. 2 of ‘Text of Resolution of Advice and Consent to Ratification,’ printed with Treaty Doc. 103-39 in Hearings on the Un Convention on the Law of the Sea, Oct. 21, 2003, along with “Statement of William H. Taft, Legal Adviser to the Department of Stat) But UNCLOS itself stipulates that states may not attach “reservations” to their ratification.⁷ Again, it will be up to ITLOS to decide what significance, if any, should be accorded such unilateral U.S. “understandings.” And the court’s composition is not encouraging. As of September 2005, a clear majority of the court’s 21 judges were from states that cannot be supposed to be friendly to American naval action—including Russia, China, Brazil, Cameroon, Ghana, Senegal, Cape Verde, Tunisia, Lebanon, Grenada, and Trinidad.

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The earlier round of UNCLOS negotiations in the 1950s proposed, in addition to specifications of transit rights and delimitations of coastal waters, a separate treaty obliging signatories to refer disputes about these matters to the International Court of Justice (ICJ) in the Hague, the Netherlands. The United States welcomed clarification of the basic rules but successfully resisted the proposal that all disputes be referred to the ICJ. In the mid-1980s, infuriated by the ICJ's handling of a case launched by the Marxist Sandinista government in Nicaragua, the U.S. withdrew its previous commitment to respond to claims before the ICJ by any state which agreed to open itself to all such claims in turn. And, of course, the United States has resisted urgings to submit its military personnel or any other U.S. citizens to judgments of the International Criminal Court.

UNCLOS has packaged improved rules for the seas with the requirement that major disputes about these rules will go to a permanent international court, thus deemphasizing “freedom of the seas” in favor of claims of collective ownership. As a result, states with little involvement in maritime commerce will help to determine how these rules will be interpreted and applied to nations with a lot at stake in international commerce.

Compensation for Development

The best provisions in UNCLOS are those setting down rules for economic development in areas extending up to 200 nautical miles beyond the shorelines of coastal states. In addition to their territorial waters of up to 12 miles, coastal states can also claim control over fishing and drilling in this exclusive economic zone (EEZ). The United States claimed such rights in 1945 for the continental shelf adjacent to its shores. This action provoked a variety of conflicting claims by other states, since the continental shelf—where waters are relatively shallow—does not extend nearly as far beyond coastlines elsewhere. The UNCLOS formula of a 200-mile limit for all coastal states was a compromise quite acceptable to the United States. Therefore the United States has asserted that this portion of UNCLOS should now be regarded as settled customary law, binding on all states whether they ratify this particular treaty or not. In fact, most coastal states have already claimed an exclusive economic zone in accord with UNCLOS provisions.

However, the actual treaty insists that in return for the acknowledgement of such claims, coastal states must provide compensation *to the rest of the world*. The most blatant application of this concept concerns mineral extraction on the continental shelf beyond the 200-mile limit. UNCLOS allows claims to the limit of the continental shelf or up to 350 miles from the shoreline, whichever is less.⁸ However, to claim such additional drilling rights the state must first accept delineation of its continental shelf by a special Commission on the Limits of the Continental Shelf, established by UNCLOS with a requirement that the Commission's membership show for “equitable geographical representation” in its membership.⁹ If it chooses to exercise drilling or mining rights in this area beyond its EEZ, a state must provide a portion of revenue derived from such activity—increasing at 1 percent a year up to a rate of 7 percent per year—to the Deep Seabed Authority, an agency established by UNCLOS for general supervision of deep sea development.¹⁰

The United States government already provides sizable contributions—often over extended periods—to international aid organizations for programs—such as vaccination, schooling, and road building—which it considers likely to improve conditions in developing countries. UNCLOS does nothing to advance this. Instead, it requires states that are able to extract mineral wealth from the seas to compensate those that are not—while the non-extracting state contributes nothing to the equation.

Moreover, money extracted from drilling efforts on the continental shelf goes to an entity that is not equipped to administer development assistance to developing countries. The Seabed Authority is not even charged with doing that. UNCLOS instead makes all mining operations in the deep seas—beyond the continental shelf or the 350 mile limit of coastal states—subject to approval by this agency. The Authority is not only authorized by UNCLOS to regulate mining operations to guard against environmental and safety concerns, it is also authorized to enforce the treaty's assertions that “resources [of the deep seabed] are the common heritage of mankind”¹¹ and that “all rights in [these] resources” are vested in mankind as a whole, on whose behalf [the Authority] shall act.”¹²

The original treaty, negotiated during the heyday of socialist enthusiasm, contemplated that the Authority would serve “mankind” by reserving a considerable share of mining operations to an internationalized public production entity, to be known as “the Entity.” By the late 1970s, many Third World governments had “nationalized”—i.e. forcibly seized—mines and oil wells developed by foreign companies and were eager to form OPEC-style international cartels to boost the prices they could obtain for raw material exports by limiting their supply in world markets.

While nothing came of this effort, UNCLOS enshrines one aspect of it. UNCLOS provides for an Economic Planning Commission to monitor “factors affecting supply, demand and prices of minerals.”¹³ Relying on Planning Commission reports, the Authority is then directed to adjust its permits for deep seabed mining to assure “just and stable prices remunerative to producers and fair to consumers.”¹⁴ The idea is to assure that mining from the deep seabed does not provide *too much* competition to mines on land.

The Reagan Administration emphasized objections to the regulatory role of the Authority when it rejected U.S. participation in UNCLOS in 1982. Most European countries also withheld their approval at the time. A decade later, with communism in collapse and the benefits of the free market widely acknowledged, the Clinton Administration joined with Europeans in negotiating revisions to UNCLOS. A supplementary agreement, completed in 1994, does go far in correcting the treaty’s most egregious provisions on deep seabed mining. The agreement directs that mining in the area controlled by the Authority should be pursued “in accordance with sound commercial principles” and neither subsidized nor protected by special tariffs. One revision eliminates enforced contributions to the Entity and stipulates that its activities be regulated on the same terms as private firms. The treaty also signals a repudiation of cartel planning by folding the Economic Planning Commission into a separate Legal Commission.

All of this is to the good. It might also be seen as bowing to reality. Mineral extraction from the deep seas has turned out to be much more expensive and difficult than Third World diplomats imagined in the 1970s—in fact, no firms have expressed serious interest in such projects. Since its establishment in 1995, the Authority has authorized a handful of exploration efforts but has received no bids for actual mining projects.

It remains a fair question whether a complex U.N. regulatory bureaucracy—especially one that counts international wealth redistribution as one of its functions—is a reassuring presence for investors. The 1994 Agreement does not actually abolish the Planning Commission, but simply suspends its operations until the regulatory council of the Authority “decides otherwise.”¹⁵ The Seabed Authority still proclaims, on its official website, that it will oversee “action to protect land-based mineral producers in the third world from adverse economic effects of seabed production.” The 1994 Agreement seems to give at least tacit support to this notion in empowering the Authority to provide “economic assistance” to “developing countries which suffer serious adverse effects on their export earnings” from deep seabed mining.¹⁶ The Authority can still direct proceeds from mining or drilling approved for the continental shelf to compensate “affected developing land-based producer States.” If the world wants to encourage mining in the deep seabed, this is no way to do it.

Further, this approach carries an immediate risk to U.S. national security. Allegedly to ensure that the benefits of deep sea mining are properly shared, UNCLOS requires all states to “cooperate in promoting the transfer of technology and scientific knowledge” relevant to exploration and recovery activities in the deep seas.¹⁷ The 1994 supplementary agreement endorses these provisions, qualifying them only with vague

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assurances that technology transfer should be conducted on “fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights.”¹⁸

It remains to be seen whether the Authority will assert claims to impose technology transfers in this field. It could do so by making such transfers a condition for approving permits for exploration or recovery by Western firms, since all such activity requires approval of the Authority.¹⁹ Yet even without direct demands from the Authority, the Chinese government, by invoking these provisions, managed to obtain microbathymetry equipment and advanced sonar technology from American companies in the late 1990s. China claimed to be interested in prospecting for minerals beneath the deep seas. Pentagon officials warned against sharing this technology with China, given its potential application to anti-submarine warfare. But other officials in the Clinton Administration insisted that the United States, having signed UNCLOS—even if not yet having ratified it—must honor UNCLOS obligations on technology sharing. Future administrations may be more vigilant, but the Authority may, in the future, be more insistent. That is the logic of a treaty that makes mining by firms in one country contingent on the approval of the governments in other countries.

An International Regulatory Agency

UNCLOS has another troubling feature in its provision for general regulation by the Authority. The Authority is empowered to establish “appropriate rules, regulations and procedures” to “ensure effective protection of human life”²⁰ and to “control pollution and other hazards to the marine environment.”²¹

The Authority has an elaborate structure. All major matters must be approved by the “Assembly,” which is comprised of delegates from all states which have ratified UNCLOS. Yet the Assembly can only consider rules already endorsed by the 36-member Council, representing a subset of member states.

The 1994 Agreement specifies eligibility for the Council with formulas that would assure the United States a permanent seat—as “the state having the largest GNP”—if it were to ratify UNCLOS. It also assures permanent seats for Russia—as the largest state in “Eastern Europe”—and China and India—under a set-aside for “states with large populations.” There will, in any case, always be a majority of developing countries on the Council, given various other eligibility formulas. For instance, only four of the 36 seats are reserved for “states which have made the largest investments in [deep sea mining] activities.”²²

Contrary to some advocates’ claims, the 1994 supplementary agreement does not give the U.S. a veto over actions of the Authority. Under UNCLOS, the Council is only required to act by “consensus”—so that one negative vote would constitute a veto—when it endorses “rules, regulations and procedures [which] relate to prospecting, exploration and exploitation in the Area,” that is, the deep seabed.²³ However, the 1994 agreement specifies that the Council may make decisions by two-thirds vote on matters of “substance” and by mere majority on matters of “procedure”²⁴ Thus, a mere majority may decide, as a matter of “procedure,” when a seemingly “substantive” decision is really only procedural, empowering the deciding majority to decide on further questions by a simple majority vote.

Even where the United States retains a veto, it does so in common with all other parties to the treaty, not just with a few major powers, as in the U.N. Security Council. So even if the U.S. can force a stalemate, others can do the same and most of those others have no stake at all in seeing development go forward. The U.S. veto on rules about licensing of specific efforts does not, of course, ensure that favorable rules can be enacted. If mining does ever become financially attractive in the deep seabed, the Authority will remain an awkward regulatory structure. In effect, it subjects the handful of countries—or rather firms from such countries—to regulatory oversight from all the other countries in the world, on the grounds that all have a stake in what

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happens on the deep seabed. So far, the Authority has only issued one set of regulations (governing exploration for manganese or polymetallic nodules, which might be recovered from the surface of the ocean bottom). It has begun work on a new set of regulations on sulfide crusts, found around volcanic hot springs.

Regulations are not likely to be restricted to such mining operations, however. Already, the Authority has been urged to issue regulations to limit bioprospecting for commercial applications of new species—mostly microbial—discovered on vents at the depths of the seas. Here again, the handful of firms with the capacity to undertake such initiatives will be subject to control from bystanders. Yet scientists think that exotic bacteria found only at extreme depths of the sea may offer keys to the development of new antibiotics, antitumor agents for treatment of cancer, and other pharmaceutical applications. And the regulatory reach may extend even further. Given its authority to protect the “marine environment” in the deep seas, the Authority might claim some authority to regulate what is done in territorial waters or even on land, when such activities have some effect on the deep seas.

Attempting to impose environmental standards outside the deep seas would be a stretch beyond the Authority’s assigned responsibilities, since the relevant UNCLOS provision only enjoins the Authority to take “necessary measures...with respect to activities in the Area”—that is, the deep seabed.²⁵ But who would determine when the Authority overreaches? Another UNCLOS body, of course. UNCLOS provides that disputes about the proper reach of the Authority must be submitted to the International Tribunal for the Law of the Sea (ITLOS) for resolution.²⁶ On the other hand, UNCLOS imposes ambiguous restrictions which direct ITLOS not to “pronounce itself...on whether any rules, regulations and procedures of the Authority are in conformity” with UNCLOS “provisions” but only to judge “applications” of “rules” in “individual cases.”²⁷ Then again, at the request of the Assembly or the Council, ITLOS may offer “advisory opinions” which do not seem to be bound by these or any restrictions.²⁸

Ireland has already attempted to win a ruling from ITLOS against a land-based nuclear facility in Britain—on the ground that it would indirectly affect marine life in Irish waters by slightly increasing water temperatures. ITLOS has accepted the claim as within its jurisdiction. With help from ITLOS, the Authority may well claim much broader regulatory powers beyond those specified in the text of the treaty. In any case, the Authority can extend its regulatory powers in ways that would bind all signatories, when three-quarters of the member states vote to endorse an amendment of the treaty.²⁹

Dangerous Precedents

By ratifying UNCLOS, the United States would be submitting itself to a much wider range of international controls than it has in the past. Allowing ITLOS to sit in judgment on U.S. naval tactics or allowing the Authority to press U.S. firms to share strategic technologies with countries like China can only prove damaging to U.S. national security. It may also be detrimental to U.S. economic interests to allow the Authority to place conditions on when and how U.S. firms can search for minerals or commercially valuable microbes in the deep seas.

In addition, in the long term, there are serious risks involved to American national sovereignty in accepting the underlying premise of UNCLOS III. The most valuable provisions,

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regarding transit rights and national regulatory rights in exclusive economic zones, are widely accepted. They have therefore a solid claim to be regarded as customary international law. By ratifying the treaty, the United States would be saying that it cannot retain its rights under customary international law unless it agrees to accept new international institutions that other countries happen to favor. Worse, ratification would seem to endorse the notion that American rights can only be secured by appealing to new international institutions. From there it

is only a small step to the claim that further progress on other international matters requires submission to new and more far-reaching international controls, developed and implemented by new supranational organs.

The United States has a stake in working with other nations to protect the global environment. For that purpose, it has entered into a number of conventions and agreements, such as, for example, conservation agreements to preserve fish stocks in international waters. But it is one thing to agree to a common standard and another thing to be bound by the decisions of an ongoing regulatory council in which the United States can be easily outvoted. It is one thing to agree to submit particular disputes to international arbitration, with the consent of both parties. It is entirely another thing to establish an ongoing court, with mandatory jurisdiction over important matters and an open-ended claim to “advise” on the law apart from particular disputes. It is something else again to embrace a court that, being permanent, may be prey to all the temptations of judicial activism, to extending its authority by enlarging its jurisdiction and winning popularity by playing favorites in its judgments.

The United States has traditionally respected limits on what it can agree to do by treaty. In the past, it has refused to ratify treaties that delegate so much authority to international institutions. By ratifying UNCLOS, we would not only open ourselves to immediate risks and complications regarding actions on the seas, we would also make it harder to resist more ambitious schemes of global governance in the future. We have said in the past that we cannot submit to such impositions on our own sovereignty. President Reagan made this point in rejecting UNCLOS in 1982, pointing to the open-ended regulatory powers of the Authority. If we ratify UNCLOS, we make it much harder to explain—to others, as to ourselves—why we cannot embrace further ventures in “global governance,” like the International Criminal Court or the Kyoto Protocol. We would feed demands for similar international control schemes for Antarctica or Outer Space.

The U.N. Convention on the Law of the Sea is not simply a bad deal for the United States. It is a very bad precedent. It is a dangerous precedent at a time when other countries are eager to hand over their own sovereignty to international institutions, in the hope of constraining American sovereignty.

Notes

¹ The reigning U.N. philosophy in that era has been described as “international social democracy”—not because most U.N. members favored democratic debate and elections at home (most were, in fact, rather nasty tyrannies at home) but because they envisaged a world in which a majority of states could dictate “international law” to the minority, on the principle of one state-one vote.

² Third United Nations Convention on the Law of the Sea, Art. 110

³ Art. 290, Par. 5

⁴ Par. 292, Par. 2

⁵ Art.33

⁶ Art. 298, Par. 1b

⁷ Art. 309

⁸ Art. 76.6

⁹ Art 76, Annex II

¹⁰ Art. 82

¹¹ Art. 136

¹² Art. 137, Par. 2

¹³ Art. 164, Par. 2b

¹⁴ Art 150,f

¹⁵ Sec. 1, Par. 4

¹⁶ Sec. 7, Par. 1

¹⁷ Art. 144, Par. 2

¹⁸ Sec. 5, Par. 1b

¹⁹ Art. 147, Par. 2

²⁰ Art. 146

²¹ Art 145

²² Sec. 3, Par. 15b

²³ Art. 162, Par. 2o

²⁴ Sec. 3, Par. 5

²⁵ Art. 145

²⁶ Art. 187

²⁷ Art. 189

²⁸ Art. 191

²⁹ Art. 316, Par. 5

About the Author

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