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THE LAW OF THE SEA TREATY: STILL FLAWED AND INCREASINGLY IRRELEVANT

(Updating *Backgrounder* No. 188, "The Law of the Sea Treaty: Can the U.S. Afford to Sign?" June 7, 1982, and *Executive Memorandum* No. 13, "A Letter to George Shultz Re: Law of the Sea," January 19, 1983.)

Senate Foreign Relations Committee Chairman Claiborne Pell is planning to hold hearings on the moribund Law of the Sea Treaty (LOST), which the Reagan Administration wisely has concluded could harm American economic and security interests. As such, the U.S. has refused to sign the accord. Pell, by contrast, supports the treaty and is urging the Administration to send observers to the Preparatory Commission that has been meeting since 1983 to draft rules implementing LOST.

The United States spent nearly a decade participating in the Third United Nations Conference on the Law of the Sea, which was charged with developing a "Magna Carta" of the oceans. When Ronald Reagan was inaugurated in January 1981, the treaty negotiations were almost complete; only a few disputes remained over the draft convention's 439 separate articles. These articles cover a range of subjects. Its most innovative feature was an Orwellian "International Seabed Authority" which would regulate private development of the seabed and would collect fees to be distributed to Third World states. A subsidiary of the International Seabed Authority, called the "Enterprise," would mine the seabed, with the expectation of eventually displacing private mining entirely.

Discouraging Development. Access to the deep seabed is important because the ocean floor is covered with billions of polymetallic nodules containing cobalt, manganese, nickel, and copper. Significant sulphide deposits also have been discovered. Increasing the supply of these resources would benefit not only the U.S. and other advanced states, but also those developing countries seeking to industrialize. Access to seabed minerals, moreover, would reduce international reliance on potentially unstable land-based suppliers of critical minerals, such as Zaire and South Africa.

The LOST would discourage seabed development. Many of the treaty's stated objectives, such as "rational management" and "just and stable prices," are well recognized code phrases for a producers' cartel. The treaty, for example, explicitly

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limits production of manganese nodules and places a moratorium on the development of other resources. To make matters worse, LOST would create a byzantine regulatory system that would smother incentives to mine the seabed. Example: A private company would have to survey two potential mining sites and turn one over gratis to the Enterprise; if a production authorization were granted, the company could be forced to turn over its proprietary technology to the Enterprise and developing states; and 15 years after the commencement of production, numerous Third World states could amend the treaty to end all private mining.

Predictions of Global Anarchy. The LOST does address important non-seabed subjects, such as navigation, fishing, and scientific exploration. In these areas, however, the treaty largely codifies emerging customary international law. When the U.S. voted against the treaty at the U.N. more than five years ago, there were dire predictions that a U.S. refusal to participate in a new Law of the Sea regime would trigger global anarchy and lawlessness. Yet no such problems have arisen. Foreign countries have accepted American claims to an exclusive economic zone similar to that provided by the treaty; the navigation rights accorded U.S. ships are the same as those allowed any other nation. When freedom of the seas is threatened, as in the Persian Gulf, the lack of a universal LOST is irrelevant. Though the U.S. was the only major nation to vote against the LOST that April, since then no important industrialized state has ratified the pact, including the USSR. As long as the U.S. refuses to sign, the LOST is effectively dead.

Since 1983 a Preparatory Commission--or PrepCom as it is known in U.N. patois--has been meeting periodically in Jamaica to draft rules and regulations to cover seabed mining. The U.S. has refused either to send observers to the sessions or to pay the share of its U.N. assessment attributable to the Commission. Now, however, treaty champions Pell and some middle-rank State Department officials, are pushing for the U.S. to join the PrepCom to seek adjustments in the LOST. They apparently believe that the Commission might repair the LOST's flaws. This ignores the PrepCom's limited authority. It must implement the LOST as written. Moreover the PrepCom is no more likely to satisfy American concerns than was the original U.N. conference. Though Third World rhetoric may be cooling, a majority of U.N. members remain hostile to American political and economic values. While attending the PrepCom would yield the U.S. no benefits, participating would undermine opposition to the treaty in Western Europe and other allied nations.

Private-Sector Solution. In place of the flawed LOST, the U.S. and several other Western countries have negotiated a "reciprocating states agreement," providing for mutual recognition of the operations of each nation's mining consortia. The companies have separately settled disputes involving overlapping mine site claims with each other and even the Soviets. The result: an international order is arising outside of the LOST process. This private, market-based system will provide a far more conducive environment for ocean mining in the future than would the treaty. Ronald Reagan and Secretary of State George Shultz should continue to keep the U.S. out of the Preparatory Commission while promoting alternative bilateral and multilateral arrangements to protect American economic, political, and security interests.

Doug Bandow
Visiting Fellow

Doug Bandow served as a Special Assistant to President Reagan and a Deputy Representative to the Third United Nations Conference on the Law of the Sea.