Law of Sea Treaty

By Doug Bandow

The Law of the Sea Treaty (LOST), an omnibus treaty originally blocked by U.S. President Ronald Reagan, is back, supported by internationalist activists and profit-minded businessmen.

The convention, originally intended to promote large-scale income redistribution to Third World states, creates an International Seabed Authority to regulate ocean mining and the Enterprise to mine for the ISA.

Treaty proponents prefer to emphasize the LOST's provisions covering navigation and the environment. They dismiss the mining provisions as having been ``fixed'' a decade ago.

But the Senate should look carefully before it ratifies LOST. There are benefits, but they have been exaggerated. And the seabed regulatory system remains deeply flawed.

For instance, the treaty still may require the transfer of proprietary technology. The revised LOST deletes only one section of the original mandatory technology transfer provision. The other remains, directing the authority to ``promote and encourage the transfer to developing states of such technology and scientific knowledge.''

Moreover, the authority and member countries ``shall initiate and promote'' programs ``for the transfer of technology to the Enterprise and to developing states,'' including ``facilitating the access of the Enterprise and of developing states to the relevant technology.''

The revised text also adds new language. For instance, ``If the Enterprise or developing states are unable to obtain deep seabed mining technology, the authority may request all or any of the contractors and their respective sponsoring state or states to cooperate with it in facilitating the acquisition of deep seabed mining technology.''

Even the clause guaranteeing ``protection of intellectual property rights'' is of little value, since governments routinely use compulsory licensing to override foreign patents (just ask the pharmaceutical industry).

Moreover, some treaty proponents point to expansive litigation possibilities. For instance, William C.G. Burns, a professor at Monterey Institute of International

Studies, contends that LOST ``may prove to be one of the primary battlegrounds for climate change issues in the future."

He cites the treaty's expansive definition of marine pollution, writing that ``the potential impacts of rising sea surface temperatures, rising sea levels, and changes in ocean pH as a consequence of rising levels of carbon dioxide in sea water" all could ``give rise to actions under the convention's marine pollution provisions."

He figures ``the specter of litigation" might affect member government policy.

Moreover, Annex III, Article 21(2) states that LOST tribunal decisions ``shall be enforceable in the territory of each state party." Treaty advocates say don't mind the text, LOST obligations won't be enforceable in national courts.

But in the recently decided Medillin v. Texas case before the U.S. Supreme Court, Justice John Paul Stevens contrasted the Vienna Convention — which the court determined was not self-enforcing — with LOST, which he opined did ``incorporate international judgments into international law."

No wonder LOST supporters discourage full disclosure. Bernard Oxman of the University of Miami acknowledged that the text ``is amply endowed with indeterminate principles, mind-numbing cross-references, institutional redundancies, exasperating opacity and inelegant drafting."

Thus, he advocated ``restraint in speculating on the meaning of the convention or on possible differences between the convention and customary law."

After all, he wrote, ``It is essential to measure what we say in terms of its effect on the goal. Experienced international lawyers know where many of the sensitive nerve endings of governments are. Where possible, they should try to avoid irritating them."

One ``sensitive nerve ending" is LOST's authority over land-based pollution. Article 207 of the treaty mandates: ``States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources." States also ``shall take other measures as may be necessary to prevent, reduce and control such pollution."

Treaty advocates claim that this provision is merely hortatory. Yet Lawrence Kogan of the Institute for Trade, Standards, and Sustainable Development warns that several provisions create a potential cause of action and could ``be used to commence litigation against the U.S." LOST already has generated a suit by Ireland against Great Britain over domestic-source pollution.

Again, LOST supporters say don't worry, but it is not clear they are being straight with us. The World Wildlife Federation and Don Kraus of Citizens for Global Solutions have been telling environmentalists that LOST could stop Russian from polluting the Arctic.

How can LOST bind Russia but not America? One advocate recently sent an e-mail — which ended up in my hands — worrying about the consequent difficulty in allaying fears of LOST being ``some kind of green Trojan Horse."

A Trojan Horse, green or otherwise, is a good description of LOST. The U.N. has proclaimed that 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.''

Where might that ``dynamic and evolving body of law'' end up? The U.S. Senate must answer that question before it considers ratifying LOST.

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