INSTITUTE FOR TRADE, STANDARDS, AND SUSTAINABLE DEVELOPMENT

The Proposed Law of the Sea Treaty: A Threat to Private Property Rights

By Lawrence A. Kogan

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116 Village Boulevard, Suite 200
Princeton Center
Princeton, NJ 08540-5700

Phone: 609-520-2144
Fax: 609-897-9598
E-mail: lkogan@itssd.org

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Thank you, Carol, for inviting me to attend your Eleventh Annual Conference. Last year I tried to convey the national and the international effects of a growing wave of socialist conduct that seems to be emanating from Europe. It definitely has a direct impact on everybody in this room as well as others who are not in attendance.

The Law of the Sea Treaty—I would like to begin by addressing a few different concepts that I think are inherent in the treaty. First of all, you can't just focus anymore on what occurs locally because what is local may be global. And what you see injected into discussion in bills in municipal and state legislatures may not be thoughts that originated in your local county or municipal or state level officials' mind. There's a lot of interchange of ideas. You have judges going overseas sharing their interesting thoughts with other judges about the way law should be, not the way it is. You have legislators going across the big pond from Europe and from Washington and bellowing about all different types of issues and their suggested cures. Having recently spoken with the current President of the Czech Republic, Vaclav Klaus, whom I met in New York shortly after his speech at the United Nations General Assembly this September, one of the key things I learned was that all the research that I have been doing for the last four to five years is actually on the mark.

There is a trend in Europe based upon their notion of rights—versus our notion of rights—that looks to control pretty much everybody's economic life. This is a vestige of socialism, Marxism, which is now "soft socialism." You can barely see it because they try to hide it. It is based on the distinction between positive rights and negative rights. We've all been talking about property today, and that is an example of a negative right because it is a right to exclude others from the use and ownership of something that you own, something that you use. It's your property. You have the right to exclude others from its use, either temporarily or permanently, depending upon the duration and scope of the property right. That ranges anywhere from absolute in a fee simple ownership to a leasehold to a lease to a rental property to an intangible property, such as a patent or a copyright which may either span twenty years or a lifetime plus seventy-five. But each of those rights in our system, based on common law embedded in the Constitution and based on natural rights, is an exclusionary right. We have a right to exclude others and the government from treading on our rights.

In Europe it's different. It is positive rights. German law professors have sourced this out back in the burgs of Germany in the eighteenth and nineteenth centuries, that positive rights were granted by the monarch. Even before then, these rights were granted by the English kings and the French monarchs to mollify the populations so they could gain legitimacy during their time of rule. Therefore, since they are positive rights and they are granted by the sovereign, they can be taken away by the sovereign. That must go together in your minds with the idea of commonality, Communism, communality, community-based thinking. In other words, "all for one and one for all" really means that the individual is subservient to the population, to the civitas, and, therefore, must think about the effect of everything he or she does to the community.

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We have the opposite belief here, that the individual is supreme and that as a collective of individuals we can make a bigger splash and a greater difference and provide more positive good than the community as a whole. So when we think about the taking of land, either directly through eminent domain, or by regulating the use of property through environmental regulation or even health regulation in some cases, we have to look at that distinction.

Public trust doctrine is borrowed from Europe, but it was used here very often back in the 1970's. It's now making a recurrence because, obviously, everything must be set aside for the community. That is where this distinction between positive and negative rights fits in. Police powers are a way to exercise the community rights in favor of the community and at the expense of the individual if they are not consistent with one another.

The Law of the Sea Treaty happens to be the largest regulatory treaty ever conceived by humankind. It has over 200 pages of provisions. It has over forty-five articles dealing with the environment. It has two protocols which are additions to the treaty and which are used as separate treaties to implement its provisions. Plus, in one case it has three regulations that are already out there dealing with the environment.

This Law of the Sea Treaty goes back to the era of President Reagan, and even before, during the new international economic order of the 1970's and during the Cold War era. The Navy, who we have gone up against, believes that this Law of the Sea Treaty was an attempt to codify prior customary law on freedom of the seas because freedom of the seas is necessary to conduct international commerce. That is what has raised the economic activity and the wealth of nations throughout history. And the 1982 agreement of the Law of the Sea pretty much codified prior law that goes back to the fifteenth and sixteenth centuries, and was brought up to date through freedom of navigation and innocent passage rules. That means that the right of way goes to the commerce, the vessel that goes through the international waters. The states along the coast had limited rights to exercise in the case of emergency or other types of exigent circumstances. I am talking in very broad brushstrokes here.

The agreement kept on progressing with other UN General Assembly meetings, and governments other than the United States chiming in about how the freedom of navigation should be hindered, because it is a capitalist notion. It's not something they were used to in the Soviet Block during the Cold War era, so they came up with all types of different conditionalities in this treaty. Eventually there were objections raised by President Ronald Reagan, which a number of groups in this room have also mentioned in their writings and communicated to people in Congress. Basically, President Reagan said he was not satisfied with that treaty because, among other reasons, it was a redistribution of wealth treaty. There were mining interests at that time for copper, gold, and other minerals at the bottom of the ocean floor that the UN as a redistributionist body intended to allocate among the nations of the world, not only those with the technology to extract those minerals. And there was an agreement that was cobbled together to modify the 1982 agreement that was really never passed and never agreed to during President Reagan's tenure, but was brought up again during President Bill Clinton's

tenure in 1994. That agreement was allegedly marketed as "fixing the objections that President Reagan had." However, those objections were never really addressed fully, despite the rhetoric that came out of Washington during the Clinton Administration.

One of the things we have been looking at is to convert the rhetoric that is being pushed through the Congress and even through the current George W. Bush administration and explain the difference between the myths and the realities. The interesting thing is that President Bush all of a sudden wants to ratify this treaty. A Republican president who claims to have conservative values and wishes to ratify a treaty like this either is smoking something or he has other interests.

The point is that you have a power grab by the United Nations. There are a number of different agencies in the UN that are working on a "sustainable development" paradigm internationally, to change the way human beings conduct their daily lives—because we are bad and nature is good, just as John had mentioned earlier. Sustainable development came about during 1987, in the "Limits to Growth" report from the former Prime Minister of Norway, Gro Harlem Brundtland. That resulted in the 1992 UN Convention on the Environment, and then all these new laws came about following the fall of the Berlin Wall in 1989. So taking all of this UN thinking and this global collectivism thinking, you have now a new effort to push the UN as a legislative, a global executive body, to impose other than American values on Americans. Obviously they are trying to create social parity rather than social progress in the world today, because our current system of capitalism is blatantly unfair in their eyes. Private property rights, being exclusionary, don't give "fairness" to others who don't have those rights. Therefore, they want to weaken private property rights in the name of sustainable development. Sustainable development, in general terms again, focuses mainly on environmental conservation—not just protection, but conservation. As a result, sustainable development has given birth to new concepts of law that Europe, being their originator, wishes to push through the UN as a global body of law.

One of the concepts that I spoke of last year was this notion of the "precautionary principle." Basically, that says, "Better safe than sorry." If it's possible that something bad could happen to the environment, whether you do it on your own property or not, then it can't be done. And the way it can't be done is we impose laws that prevent you from doing it. You could be emitting something into the air in your business activity or through your personal activity that's not good for the air, it pollutes. Or you could be dumping something into the waterways, whether it be a pond, an estuary, a river, or even the ocean. Or it could be just that you are experimenting with new technologies about which there is absolutely no way to know how it is going to affect the future environment or future health of other people. So the precautionary principle says if you don't know anything about it, and you can't possibly anticipate the bad things about it, don't do it. There is no provable science involved in this concept, nor is there any concept of economic cost. Economic cost is not one of the important things when you are conserving the environment for future generations, which is the ultimate goal of sustainable development.

Now, the Law of the Sea Treaty incorporates over forty-five environmental articles. It has protocols that are environmental. It has regulations that are environmental. What they are

116 Village Boulevard, Suite 200
Princeton Center
Princeton, NJ 08540-5700
Phone: 609-520-2144
Fax: 609-897-9598
E-mail: lkogan@itssd.org

intended to do is to protect the marine environment from all types of bad things that come off the land, in addition to the bad things that can happen in the open high seas. This is where R. J. Smith's discussion of the Clean Air Act amendments fits into the puzzle, as well as discussions about the Clean Water Act, the Migratory Birds Act, the Magnuson-Stevens Fishery Conservation and Management Act, and the Coastal Management Acts that you see being invoked in California and Florida.

The puzzle is that the Law of the Sea Treaty is almost like a power station. If you look at the world as a body of lights, the ocean is pretty much dark at this point because every country has its own lights—those lights representing their laws, and those laws either prohibit you from doing something or allow you to do something.

In Europe they came out with an article in September's Economist that drew a very, very stark distinction between our legal system and theirs, and our cultural system and theirs. In Europe, based on the Napoleonic Civil Code, they can tell you what you can do and what you cannot do. In our constitutional common law tradition, government usually tells you what you can't do. This is based on our strong belief in limited government and its role to act pretty much as a referee and only to protect us when we really need to be protected from ourselves or from others. Now, again, I am talking general strokes here. But that distinction was drawn up in an article.

If you think about Europe's penchant for regulating, it has already become to a great extent the global regulator of default because it regulates more than any other country or region in the world. It proclaims 95,000 pages of regulations and it's still growing. It proclaims that it wishes to be the global regulator because other humans in other countries don't recognize the threat to the Earth. This is Al Gore, Earth in the Balance. In fact, the British government under Tony Blair hired Al Gore last year—the day after Halloween—to advise them on climate change because I guess they needed more advice from the sage. But this deals with global supra-national governance. This deals with looking at the Law of the Sea Treaty, which many people both in Congress and overseas have referred to as a "global constitution." They tie it together with the Universal Declaration on Human Rights, which goes back to 1946. They tie it together with the UN Covenant on Economic and Social Rights which was enacted in the 1970's. They wish to tell us plainly and simply that our U.S. Constitution no longer will govern international affairs, let alone our own affairs, because it's based on an individualist model of government insufficient to meet the demands of sustainable development.

Now, I am not making this up. Europe is out there proclaiming this in its laws. They use private standards through industry supply chains to do the same thing, and they use organs of the UN to intimidate industry to adopt those standards. For instance, Tom Borelli was talking this morning about J.P. Morgan. They were basically extorted into following environmental standards to protect the forests that might be impacted by some of their loans indirectly sometime in the future.

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It also has happened with respect to manufacturing companies. They can only buy certain procured products. If you go to a Home Depot, you will find something labeled "sustainably managed forest products." The label has a disclaimer that there is no qualitative difference between that type of product and a normal product. The only thing is that it is environmentally enlightened, and if you wish you can pay more money to feel good, just like when you buy a Prius, then you can. It's your freedom of choice as an individual. But they don't want and are not satisfied with leaving it as a matter of choice, they wish to mandate it through law.

Going back to my power station metaphor for the Law of the Sea Treaty, if you look at the countries around the oceans as the lights and the sea as the darkness, the United States being the last holdout is really significant. Then you turn the power station on and connect all the dots, that means all the laws in this treaty, all the articles in this treaty, plus all these other related treaties which number over one hundred, can be plugged in and used against the United States. The treaty basically is a framework treaty which is almost like a lazy Susan on your kitchen table. You spin it around and all of a sudden you can find a box which is just another environmental treaty that came out of the UN environment program, and you can pick up its provisions and apply it through this treaty's dispute settlement mechanism. What that means is that this treaty provides the environmentalist community, as well as foreign governments, with the ability to sue the United States in an arbitration or in a tribunal such as the International Court of Justice. If a suit is successful, arguably it is binding on the United States. Obviously, there is no way they are going to force us to abide by the decision, but if you sign on to a treaty you are obliged to follow its rules. Otherwise, signing on to it in the first place is a sham. You don't give international law any credibility.

I know a lot of people here don't believe in international law, and they think it's the worst thing that can possibly happen, but that doesn't stop it from evolving. We can all put our heads in the sand and say it doesn't exist, but in reality they just keep on churning out the treaties. The United Nations Environment Program is a treaty-making machine of the UN. And it so happens that all of these environmental treaties conveniently have this constant called a precautionary principle in them. And the environmental community has taken the last twenty years to incorporate them one by one, treaty by treaty. They are very, very patient about putting the same concept in all these different treaties. The wording may not say "precautionary principle" in some cases, but that doesn't prevent foreign governments and activists from using nuances of the words. The French are famous for the nuance, as are we when we want to negotiate things in our own interest. "It looks like 'X' but we say it really means 'Y.'" And then all of a sudden we have to adopt national laws in order to fulfill our obligations under the treaty.

Out there are the amendments to the Clean Air Act and the Clean Water Act, and the Coastal Zone Management Act amendments are probably cooking somewhere in some committee. There are even chemical regulations that are being sought to be amended, because anything that flows into the marine environment or floats into it from a smokestack or other source on land is actionable under this treaty. The United States could be brought into a tribunal against its own will. Even military contractors can be brought into this treaty even though the military claims it

has a military exemption. But that is not foolproof and they know it, but they still represent that it is. The U.S. government will be increasing their outsourcing of military technologies and production of supplies by fifty percent within the next five to ten years. This means that all these contractors making these products and technologies and shipping them overseas will be subject to a coastal state saying, "You are doing something bad in the oceans when you are carrying this cargo from point A to point B. We are going to stop it." Or, "You can't even make the product in your country because you are emitting something into the waterway that could harm some endangered species." The Endangered Species Act and the Migratory Birds Act have a list of species that keeps getting added to each year. This machine will be turned on further and enhanced by this precautionary principle-based Law of the Sea Treaty.

It is wondrous that one can consider all these implications but the Senate won't hold significant hearings on this treaty. The Senate's job is to provide advice and consent to the President on ratification of the treaty, since the President submitted it to them for that purpose. It's surprising that they won't have significant hearings on it. The one committee that has had hearings thus far is the Senate Foreign Relations Committee, which has the primary responsibility and jurisdiction over treaty making. It had one hearing with government representatives on September 27, 2007. There were no opposing witnesses. They had another hearing on October 4th with two witnesses opposing the treaty and, I believe, seven or nine for the treaty. There is no plan at the current time to have any other committee of the Senate or the House of Representatives review the connection of this treaty with the implementing legislation for the federal acts, like the Clean Air and Clean Water Acts. There is no plan to review how this treaty would impact state laws, for instance, if you flush something down the toilet and it ends up in some river. Seriously, they do get inside your bowl when you trace the tributaries straight back up. No matter what you do, it could affect the marine environment directly or indirectly, which means we're all regulated.

Now, the Democratic Congress seems to think this is a good thing because, remember, we are a "global village" now. We are not just a village, we are a global village. For that reason, we put out a public service announcement that basically says this treaty is coming down the pike, and it may actually be ratified and put to the Senate floor for voting in the near future. But it probably won't be voted on in the near future. If we have something called constitutional rights such as substantive rights, substantive due process, as well as procedural rights, then, before this occurs, we should have a right to hear about what we are going to be regulated by, the extent to which it will regulate us and the extent to which it will affect our private property rights and our ability to exercise them.

In the public service announcement we have a picture of the "hear no evil," "see no evil," "do no evil" and "speak no evil" monkeys. We don't know which one of those is your Congressional representative—the one that is not speaking up, the one that says he hasn't read the treaty, or the one that says he hasn't heard anything about it. We are asking you to distribute these public service announcements so that people are aware of what is actually occurring before it occurs. This truly is the ability to exercise one's private property right, not only the right in one's property, but the property in one's rights, as James Madison said.

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Fax: 609-897-9598
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