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Law of the Sea Treaty: Through Rose-colored Goggles?

On January 22, the Worldwatch Institute, a group having the goal of bringing the global community together to address climate change, environmental degradation, population growth, and poverty, approvingly said about the UN's Convention on the Law of the Sea: "The Law of the Sea [Treaty] has set international standards for fishing, deep sea mining, and navigation since the majority of the world's countries signed it in 1982. It provides coastal nations with exclusive rights to ocean resources within 200 nautical miles of their borders — areas known as 'exclusive economic zones,' or EEZs." (Note: the treaty was initiated in 1982, but didn't enter into force until 1994.)

"The agreement also oversees an international tribunal to settle fishing, pollution, and property rights disputes, as well as the International Seabed Authority, a body formed to assign mining rights beyond the EEZs."

The institute went on to claim, "President Obama's administration and current Senate leaders have already expressed support for the treaty … [and] it is supported by a wide array of interest groups, including the U.S. Navy and Coast Guard, international environmental groups, and the mining, fishing, shipping, and telecommunications industries."

But if the Law of the Sea Treaty is such a winner, why hasn't the U.S. Senate ratified it before now? Do we have a case of politicians being grotesquely stupid, or a case of salesmanship by the Worldwatch Institute, or simply an evolving treaty?

Let us see.

In 1982, President Ronald Reagan said about the treaty: "Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with U.S. interests and, in our view, serve well the interest of all nations…. Our review recognizes, however, that the deep seabed mining part of the convention does not meet United States objectives."

And the Reagan administration was right to be concerned. The treaty, if ratified by the United States, would mandate that U.S. corporations that wanted to mine any "mineral" — oil, natural gas, gold, silver, etc. — from the "Area" (the deep oceans more than 200 miles from shorelines) would have to get permission from a UN entity called the "Enterprise," and permission could be denied to anyone for most any reason. Also, to get permission from the UN, companies would be required to give to the Enterprise for its use — and possible dissemination — any and all new technologies that it (or any other company) had developed to access the minerals, including mining equipment, robotic technology, new submarine technology, etc. So much for competitive advantage and making money off patents and intellectual property rights.

Also, if a corporation would get permission to mine, the Enterprise would set a limit on the quantity of material that could be mined, ostensibly to protect developing countries' sources of income (i.e., if a poor country mined zinc and relied on it for income, the Enterprise would limit access to zinc so as not to let worldwide zinc prices fall). Even after a company got permission to explore and the minerals were mined, the Enterprise would stay involved. The Enterprise would then take possession of the minerals and sell them (global governmental authority), keep a cut for itself (global tax), and finally give the corporation a share of the profits (global socialism). It would be a setup that a mafia Godfather would envy, with opportunities galore for skimming payouts, redirecting funds, and making payoffs — and this is the brief description; the treaty was actually much worse. For example, the treaty would have given the UN's institutions and employees virtual worldwide immunity from scrutiny — crimes cannot be prosecuted when they cannot be proven.

To pass the treaty in the U.S. Congress over Reagan's concerns, an addendum to the treaty called the Agreement on Part XI was added to the treaty. The "Agreement" — in the form of an addendum — cut some language from the original treaty and superseded other parts. If the original treaty and the Agreement are found to be in conflict, the Agreement would take precedence. We are told that there is now no longer any reason not to ratify the treaty.

That's not true.

What is true is that some of the concerns about deep sea mining have been addressed by the addendum — e.g., virtually any company that could afford the $250,000 application fee to explore for minerals and could meet the technical and legal hurdles enacted by the International Seabed Authority, the "Authority," such as an "amount equivalent to US $30 million in research and exploration activities," would normally be given permission to search (but companies could still be disapproved by a two-thirds majority of the "council" — I wonder if two-thirds of countries in the world hate the United States?). However, there are still many substantial drawbacks to the deep sea mining part of the treaty.

Mining Rights

Though the treaty no longer blatantly demands that the Enterprise be given intellectual property rights for new technologies in return for exploration and mining rights, the treaty does say: "The Enterprise … shall seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint-venture agreements; … [but] 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 … on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights. State Parties undertake to cooperate fully and effectively with the Authority for this purpose and to ensure that contractors sponsored by them also cooperate fully with the Authority." It adds, "As a general rule, States Parties shall promote international technical and scientific cooperation with regard to activities in the Area."

In layman's terms, this means that the Enterprise or a developing state can offer to purchase new technologies from companies for what the UN affiliates consider to be a "fair and reasonable" price. If the companies refuse an offer, all countries that have signed the treaty must work to obtain the new technology for the UN affiliates, and the companies are stuck receiving the "fair and reasonable" price anyway.

That the word "cooperation" in the treaty really means "coercion" is reinforced by article 302 of the convention, which says in part: "Nothing in this Convention shall be deemed to require a State Party, in

the fulfillment of its obligations [to transfer technology] under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security." In other words, military technology is off limits, but anything commercial is fair game.

This should cause nightmares for all U.S. manufacturers, not just ocean explorers, because this verbiage covers *all new technologies* used to access the ocean's mineral resources, not just new technologies specifically designed for that purpose. If an oceangoing craft carries a company's patented item and that item is used for exploring or mining the ocean floor, the intellectual property rights to it must be sold to a UN affiliate for what the UN or a developing country deems is "fair" — whether that technology be for a new submarine; new plastic, ceramic, steel, or glass; new computer software; a new engine design or underwater drill; or a water-purification system. The list is endless.

And not only must technological wherewithal be supplied to the UN affiliates dirt-cheap, but companies must train foreigners in their use "by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area." Again, so much for competitive advantage and making money off patents and intellectual property rights.

Also, just because all companies have an opportunity to explore for minerals doesn't mean they'll be given permission to access the minerals they find. "Prospecting may be conducted simultaneously by more than one prospector in the same area or areas," and in deciding which companies get "production authorizations," the Authority "shall give priority to those applicants which … give better assurance of performance, taking into account their financial and technical qualifications … and provide earlier prospective financial benefits to the Authority." And the "selection [of those who get production authorizations] shall be made taking into account the need to enhance opportunities for all States Parties."

Minding the Minerals

Like the language dealing with transferring technology to the UN affiliates, the section of the treaty dealing with profit-sharing has also supposedly been "fixed" by the Agreement to Part XI, but has it?

Because the Area has been deemed by the UN to be the "common heritage of mankind" — to be exploited for the good of all the Earth's inhabitants — the original treaty would have mandated that the Enterprise would be responsible for "the transporting, processing and marketing of minerals recovered from the Area." Much of the profits of the sales of the minerals would be set aside to go toward aiding the world's poor.

To that end, the Authority — another UN affiliate created by the treaty — and "all interested parties" would "take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the minerals derived from the Area, at prices remunerative to producers and fair to consumers. All States Parties shall cooperate to this end." This would have amounted to flat-out price-fixing and would have included reliance on "production ceilings" based on 15-year mining-production "trend lines." Companies would get their cut of the profits based on a complicated profit-sharing formula. The companies' minimum yearly fee for the right to mine would have been one million dollars and would have gone up from there — taking more than 70 percent of companies' net proceeds if the companies would make more than a 20-percent return on investment.

In the present iteration of the treaty, the production caps and trend lines have been eliminated, but the other bad stuff is still there — only it's probably worse than before. It's worse because though the

specified profit-sharing system that had been planned has been scrapped, no replacement has been designed, leaving open the possibility that the Enterprise would demand an even larger piece of the pie. It's a matter to be dealt with at a later date: "Consideration should be given to the adoption of a royalty system or a combination of a royalty system and profit-sharing system." Plus, there is still an annual fee (though the amount of this fee also has yet to be determined). Under the revised treaty, the Enterprise would still take title to the minerals after they are mined, process them, sell them, and give the company a cut. The company's share of the proceeds is unknown as of yet: "The rates of payments under the system shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage."

How would, or could, it work? Imagine yourself as a business owner who has risked everything to mine ocean diamonds. You hit the jackpot, not only discovering diamonds but devising a method to extract the diamonds. According to the treaty, you would be required to hand the rough stones to the Enterprise, either for immediate sale or to cut and polish and then sell. You would wait for your share of the proceeds of the sale of the minerals, having no idea how long it will be until you will get paid or how much you will get paid. You don't know the end weight of the gems after the UN cuts them (so you can't hazard a guess as to how much money the stones should fetch), nor do you accurately know the color, clarity, and flaws of the stones. In fact, you don't know for certain if you will get paid at all because you don't know what type of safety system will be set up to protect the diamonds from theft.

It's plain that even though the original treaty has been altered by the Agreement on Part XI, the system is still a Mafioso's dream — with opportunities for fraud in nearly every step of the process.

How many *honest* businessmen would want to be involved with such a regulatory regime, especially one with the track record of the UN — remember the oil-for-food fraud in Iraq and the sex-for-food scandals throughout Africa?

Worse, as a businessman, even if you believe that fraud is taking place at the Enterprise and that you are not being given a fair price for your minerals, there is virtually nothing you can do to remedy the situation — other than to complain to the same organization that you believe is ripping you off, or to its sister organization, "The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea." There is virtually no way for even a sovereign country to investigate fraud at the UN affiliates, let alone a company doing so.

The wording of the treaty provides nearly blanket immunity to the UN affiliates: "The Authority, its property and assets, shall enjoy immunity from legal process except to the extent that the Authority expressly waives immunity in a particular case." Moreover, "The property and the assets of the Authority, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action." There are also prohibitions against accessing the Authority's "archives" and its "official communications."

The Enterprise has similar immunities, except that it is subject to the "legal process" — sort of. Though legal "actions may be brought against the Enterprise … in the territory of a State Party," the "property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before delivery of final judgment against the Enterprise."

In other words, a legal case against the Enterprise must be won without any physical evidence taken from the Enterprise because before *any property* of the Enterprise can be seized, a case in court has to

be won. It would take an awfully moronic criminal to be caught for misdeeds under the aforementioned immunities.

And this isn't the worst of it.

Double-dealing With Dictators

Abuse of the system is bound to be systemic — from the very top echelons to the lowermost rungs — because of something called "reserve areas." The Agreement says: "Designation of a reserved area for the Authority … shall take place in connection with approval of an application plan of work for … exploration and exploitation."

What this means, according to Annex III of the treaty, is that when a company discovers minable minerals that it wants to attempt to recover, it must supply, as part of the application process, the location of a second, commercially profitable area to mine. Then the Authority will take one of these areas for its own use (the area that shows the most promise of profit, obviously) and allow the company to mine the other. The Enterprise, on behalf of the Authority, would mine the reserved area either solely or as part of a joint endeavor with a company, a developing state, or an individual in a developing state.

Of course, neither the terms of the joint ventures, including the level of profit-sharing that will take place, nor the manner in which the joint-venture contracts would be awarded are defined. Considering that "developing countries" are typically run by strongmen and all-around nasty characters, the chances that a graft-ridden, under-the-table-payment, you-scratch-my-back-and-I'll-scratch-yours, quid-pro-quo system forming, to the benefit of the criminally inclined, is 100 percent. (Even if the terms of the contracts and payments were formulated and set in stone, that would do nothing to curb the built-in incentives to pay and receive bribes.)

And the potential for graft is not limited merely to members of the Enterprise and the Authority; it will pervade the UN and beyond.

This is true because when the Authority provides economic assistance to developing nations — the ostensible purpose behind giving the UN control of the oceans' mineral wealth — the assistance will be provided, "where appropriate, in cooperation with existing global or regional development institutions which have the infrastructure and expertise to carry out such assistance programs." That is, the assistance monies would be filtered through the main body of the UN, the International Monetary Fund, the World Bank, etc. — all organizations that have atrocious track records when it comes to successfully implementing poverty-reduction programs.

Not only have the poverty-reduction plans by these groups not resulted in less poverty in the countries receiving aid ("In the 1970s, Africa had 10 percent of its population living in poverty; today that number is over 70 percent," reported foreign-aid expert Dambigo Moyo), it is no accident that the poor in these countries became poorer — the programs are designed in a manner that guarantees corruption and failure, which too is no accident.

Former French President M. Jacques Chirac, a longtime mouthpiece for increased UN-managed foreign aid, acknowledged, "Only one third of international disbursements currently go to fighting poverty." Most of the rest of the monies go to vague administrative costs, are used for projects not related to poverty, or are siphoned off by corrupt officials. And even much of the one-third of the money that does "go to fighting poverty" isn't actually being spent on poverty reduction. When it reaches the corrupt countries, it goes to the leadership of the countries, who send it out of the country — to be used to retain a life of creature comforts in case of a coup d'état — or use it to solidify their power base.

The IMF, World Bank, and other international "aid entities" work hand in hand with the corrupt leaders — but for their own ends. The "aid entities" loan money, obtained from the world's taxpayers, to known power-hungry and criminal leaders to gain leverage in the poor countries. This leverage is exploited to benefit the world's politically well-connected and super-rich. They do this by attaching "conditionalities" to the monetary handouts. The Inter Press Service reported that these conditionalities include "opening … markets to corporate agri-business and cheap food imports, which threaten farmers' livelihoods, as well as mining and other environmentally destructive projects…. Such conditions subject the poor to deeper poverty."

The poor countries often take on so much debt that they can only make payments covering the interest on the debt — which they pay year-in and year-out. Jubilee USA Network, an advocate of international aid, said in 2006: "Liberia's external debt stands at $3.7 billion, a sum which represents almost eight times the country's annual GDP." Of course, if a country refuses to service its debt, worldwide financial credit dries up, pushing the lackluster leaders to print money and cause massive inflation, destroying the country's economy — see Zimbabwe. These types of programs always fail the poor in the end.

In March, the *Washington Post* reported, Secretary of State Hillary Clinton commented about the aid the United States has given to Afghanistan. The gist of her message was that "the billions of dollars spent in U.S. aid to Afghanistan over the past seven years have been largely wasted." Clinton specifically said, "There are so many problems with [aid programs]. There are problems of design, there are problems of staffing, there are problems of implementation, there are problems with accountability."

The aid "works" mainly for the corrupt. When, after more than 60 years of redesigning and reimplementing international foreign aid, the end result has been massive increases in poverty, one wonders why *anyone* would insist on giving the international aid entities more money. (To read more about the failure of foreign aid, read "Give 'Til It Hurts, Repeat," May 11, 2009 issue, and "X-ray Analysis of Foreign Aid," December 11, 2006.)

Not only are the international aid entities designed in such a manner as to virtually guarantee fraud and failure, so is the Law of the Sea Treaty. And the treaty's flaws go beyond the obvious design flaws described herein (and the egregious design flaws in the treaty having to do with controlling commercial fishing on the oceans and with controlling military activities, which space constraints do not allow us to delve into here). Perhaps a more important flaw is the premise on which the Law of the Sea Treaty is based.

Wealth-redistribution Fallacy

The Law of the Sea Treaty is based on the idea that there is a static amount of wealth in the world and that the best way to help the poor around the world is through penalizing technologically advanced countries and forcefully redistributing wealth through benevolent leaders who have worldwide clout. But nothing could be further from the truth, which should be obvious to anyone who reads the news. Right now the world is facing a severe economic downturn, much of which is owing to people in the United States spending less money. Before the economic bust, any country that put into place practices to encourage economic development and individual freedom was booming — based largely on U.S. citizens spending money. Too bad in the present case, the wealth Americans were spending was illusory, brought on by Federal Reserve policies of printing money and keeping interest rates low, which was bound to end in an economic bust. But if Americans had been spending real wealth gained by recovering the ocean's minerals, the worldwide boom could have gone on indefinitely.

The wealth-redistribution fallacy is wrong and hurtful to the poor, as is the assumption that the international aid agencies are a wise method of ending poverty. Equally as flawed is the idea that individuals and companies should have to abide by the dictates of a centrally planned distribution mechanism — global government, a virtually unaccountable group of handpicked individuals who answer to the bureaucratic elites who put them in power. There is no chance that in the long-term, or even the short-term, these elites will do what's in the best interests of the middle-class and poor citizens of the world, or that their judgments can take into account the literally uncountable variables (trillions of variables would fall far short) that affect individual businesses doing what businesses do: creating, buying, and selling.

The proponents of this treaty, such as Scott G. Borgerson, who wrote an article backing the treaty for the Council on Foreign Relations entitled "The National Interest and the Law of the Sea," would have us believe that the United States should accede to the treaty because virtually all other developed countries have done so. Not signing on to the treaty, he claims, "tarnishes America's diplomatic reputation at a critical moment in international relations" and has led to "American energy and deep-seabed companies … [being] put at a disadvantage in making investments for seabed minerals projects by the legal uncertainty accompanying the United States remaining a nonparty."

Borgerson is technically right, but he is practically wrong. He is right that in this era of supposed tightening of global unity a decision to disavow the treaty will ruffle the world's powerbrokers, but we'd do well to remember motherly advice against jumping off a cliff just because others do it and that true "leadership" requires taking the noble path and sometimes making unpopular positions. Borgerson is also correct that American companies are at a disadvantage because of uncertainty about the Law of the Sea Treaty, but U.S. companies can be rid of that uncertainty through an official statement that the United States completely disavows the treaty and will interpret the "common heritage of mankind" to mean that all companies from all nations will be able to access the ocean's treasures in the Area.

The Law of the Sea Treaty is designed in the same vein as every other international foreign aid program by the same brand of bureaucrat. It will result in the same failure. And the only "common heritage of mankind" that will be noticeable at the end of the day is that "while the rich get richer, the poor get poorer."